94: G74/6: G74/7

94th Congress
2d Session

JOINT COMMITTEE PRINT

GOVERNMENT IN THE SUNSHINE ACT—S. 5

(PUBLIC LAW 94–409)

SOURCE BOOK: LEGISLATIVE HISTORY, TEXTS, AND OTHER DOCUMENTS

COMMITTEE ON GOVERNMENT OPERATIONS
UNITED STATES SENATE

AND THE

COMMITTEE ON GOVERNMENT OPERATIONS
U.S. HOUSE OF REPRESENTATIVES

UNIVERSITY OF FLORIDA LIBRARIES
APR 1977
DOCUMENTS DEPT.

DECEMBER 1976

Printed for the use of the Committee on Government Operations, United States Senate, and the Committee on Government Operations, House of Representatives

94th Congress
2d Session

JOINT COMMITTEE PRINT

GOVERNMENT IN THE SUNSHINE ACT—S. 5

(PUBLIC LAW 94–409)

SOURCE BOOK: LEGISLATIVE HISTORY, TEXTS, AND OTHER DOCUMENTS

COMMITTEE ON GOVERNMENT OPERATIONS
UNITED STATES SENATE

AND THE

COMMITTEE ON GOVERNMENT OPERATIONS
U.S. HOUSE OF REPRESENTATIVES

DECEMBER 1976

Printed for the use of the Committee on Government Operations, United States Senate, and the Committee on Government Operations, House of Representatives

U.S. GOVERNMENT PRINTING OFFICE

80–459 O

WASHINGTON : 1976

For sale by the Superintendent of Documents, U.S. Government Printing Office
Washington, D.C. 20402 - Price $6.60 cents

SENATE COMMITTEE ON GOVERNMENT OPERATIONS

ABRAHAM RIBICOFF, Connecticut, *Chairman*

JOHN L. McCLELLAN, Arkansas
HENRY M. JACKSON, Washington
EDMUND S. MUSKIE, Maine
LEE METCALF, Montana
JAMES B. ALLEN, Alabama
LAWTON CHILES, Florida
SAM NUNN, Georgia
JOHN GLENN, Ohio

CHARLES H. PERCY, Illinois
JACOB K. JAVITS, New York
WILLIAM V. ROTH, Jr., Delaware
BILL BROCK, Tennessee
LOWELL P. WEICKER, Jr., Connecticut

RICHARD A. WEGMAN, *Chief Counsel and Staff Director*
PAUL HOFF, *Counsel*
PAUL L. LEVENTHAL, *Counsel*
ELI E. NOBLEMAN, *Counsel*
DAVID R. SCHAEFER, *Counsel*
MATTHEW SCHNEIDER, *Counsel*
JOHN B. CHILDERS, *Chief Counsel to the Minority*
BRIAN CONBOY, *Special Counsel to the Minority*
MARILYN A. HARRIS, *Chief Clerk*
ELIZABETH A. PREAST, *Assistant Chief Clerk*
HAROLD C. ANDERSON, *Staff Editor*

HOUSE COMMITTEE ON GOVERNMENT OPERATIONS

JACK BROOKS, Texas, *Chairman*

L. H. FOUNTAIN, North Carolina
JOHN E. MOSS, California
DANTE B. FASCELL, Florida
WILLIAM S. MOORHEAD, Pennsylvania
WM. J. RANDALL, Missouri
BENJAMIN S. ROSENTHAL, New York
JIM WRIGHT, Texas
FERNAND J. ST GERMAIN, Rhode Island
FLOYD V. HICKS, Washington
DON FUQUA, Florida
JOHN CONYERS, Jr., Michigan
BELLA S. ABZUG, New York
JAMES V. STANTON, Ohio
LEO J. RYAN, California
CARDISS COLLINS, Illinois
JOHN L. BURTON, California
RICHARDSON PREYER, North Carolina
ROBERT F. DRINAN, Massachusetts
EDWARD MEZVINSKY, Iowa
BARBARA JORDAN, Texas
GLENN ENGLISH, Oklahoma
ELLIOTT H. LEVITAS, Georgia
DAVID W. EVANS, Indiana
ANTHONY MOFFETT, Connecticut
ANDREW MAGUIRE, New Jersey
LES ASPIN, Wisconsin

FRANK HORTON, New York
JOHN N. ERLENBORN, Illinois
JOHN W. WYDLER, New York
CLARENCE J. BROWN, Ohio
GILBERT GUDE, Maryland
PAUL N. McCLOSKEY, Jr., California
SAM STEIGER, Arizona
GARRY BROWN, Michigan
CHARLES THONE, Nebraska
ALAN STEELMAN, Texas
JOEL PRITCHARD, Washington
EDWIN B. FORSYTHE, New Jersey
ROBERT W. KASTEN, Jr., Wisconsin
WILLIS D. GRADISON, Jr., Ohio

WILLIAM M. JONES, *General Counsel*
JOHN E. MOORE, *Staff Administrator*
WILLIAM H. COPENHAVER, *Associate Counsel*
LYNNE HIGGINBOTHAM, *Clerk*
J. P. CARLSON, *Minority Counsel*

GOVERNMENT INFORMATION AND INDIVIDUAL RIGHTS SUBCOMMITTEE

BELLA S. ABZUG, New York, *Chairwoman*

LEO J. RYAN, California
JOHN CONYERS, Jr., Michigan
JOHN E. MOSS, California
MICHAEL HARRINGTON, Massachusetts
ANDREW MAGUIRE, New Jersey
ANTHONY MOFFETT, Connecticut

SAM STEIGER, Arizona
CLARENCE J. BROWN, Ohio
PAUL N. McCLOSKEY, Jr., California

EX OFFICIO

JACK BROOKS, Texas

FRANK HORTON, New York

TIMOTHY H. INGRAM, *Staff Director*
ERIC L. HIRSCHHORN, *Counsel*
ROBERT S. FINK, *Professional Staff Member*
THEODORE J. JACOBS, *Professional Staff Member*
MARILYN HAFT, *Professional Staff Member*
ANITA WIESMAN, *Clerk*
MAURA FLAHERTY, *Secretary*

PREFACE

This compilation of materials relating to the legislative history of Public Law 94–409, the Government in the Sunshine Act, summarizes the four-year legislative activity behind the statute providing that meetings of certain Executive Branch agencies be open to public scrutiny.

This sourcebook was prepared for the Senate Committee on Government Operations and the House Committee on Government Operations by Dr. Harold C. Relyea, Congressional Research Service, Library of Congress, at the direction of the staff of the Committees.

CONTENTS

	Page
Preface	v
Legislative History of the Government in the Sunshine Act—S. 5 (Public Law 94–409)	1
Text of the Government in the Sunshine Act, Public Law 94–409, 90 Stat. 1241, September 13, 1976	8
Senate Action	
Introduction of S. 3881, 92d Congress (Congressional Record, v. 118, August 4, 1972: S12794–S12811)	19
Text of S. 3881	21
Introduction of S. 260, 93d Congress (Congressional Record, v. 119, January 9, 1973: S373–S377)	63
Text of S. 260	65
Introduction of S. 5, 94th Congress (Congressional Record, v. 121, January 15, 1975: S59–S64)	96
Text of S. 5	98
Debate on adoption of S. 5 (Congressional Record, v. 121, November 5, 1975: S19372–S19378)	134
Text of S. 5 as reported to Senate by Government Operations Committee July 31, 1975 (with accompanying Senate Report 94–354)	135
Text of S. 5 as reported to Senate by Committee on Rules and Administration, September 18, 1975 (with accompanying Senate Report 94–381)	257
Debate on adoption of S. 5 (Congressional Record, v. 121, November 6, 1975, S19432–S19447)	320
Text of S. 5, an act, as passed	357
House Action	
Introduction of H.R. 4, 93d Congress (Congressional Record, v. 122, January 6, 1973: H43–44)	377
Text of H.R. 4	379
Introduction of H.R. 10000, 93d Congress (Congressional Record, v. 122, August 3, 1973: H7482–7483)	381
Text of H.R. 10000	385
Introduction of H.R. 5075, 94th Congress (Congressional Record, v. 122, March 18, 1975: H1939–1942)	397
Text of H.R. 5075, as introduced	398
Text of H.R. 9868, as introduced September 26, 1975	403
Text of H.R. 10315, as introduced October 22, 1975	420
Text of H.R. 11007, as introduced December 4, 1975	439
Text of H.R. 11656, as introduced February 3, 1976	457
Text of H.R. 11656, as reported by Government Operations Committee, March 8, 1976	475
Text of H.R. 11656, as reported by Government Operations Committee, March 8, 1976, and as reported by the Judiciary Committee, April 8, 1976	493
H. Rept. 94–880, Part I, text of	512
H. Rept. 94–880, Part II, text of	551
Debate on adoption of H.R. 11656/S. 5 (Congressional Record, v. 122, July 28, 1976: H7863–H7902)	595
Text of H. Res. 1207	595
Amendment in the nature of a substitute by Mr. Flowers to H.R. 11656, text of	650
Amendment by House to S. 5 as adopted and messaged to Senate, text of	705

Conference Action

Senate appoints conferees (Congressional Record, v. 122, July 29, 1976, S12839) 727
House appoints conferees (Congressional Record, v. 122, August 3, 1976, H8228) 727
Conference Committee Print—comparison of House and Senate versions 729
S. 5—Differences between House and Senate versions 773
Conference report, text of 783
House adopts conference report (Congressional Record, v. 122, August 31, 1976, H9258–H9262) 813
Senate adopts conference report (Congressional Record, v. 122, August 31, 1976, S15043–S15045) 823

Executive Action

The President's remarks and statement upon signing S. 5 into law, September 13, 1976 (Presidential Documents: Gerald Ford, 1976, vol. 12, number 38, pp. 1333–1334) 831

THE LEGISLATIVE HISTORY OF THE GOVERNMENT IN THE SUNSHINE ACT—S. 5 (PUBLIC LAW 94–409)

The first sunshine proposal (S. 3881) was introduced by Senator Lawton Chiles (D.-Fla.) on August 4, 1972, and referred to the Senate Committee on Government Operations.[1] A companion bill (H.R. 16450) was offered in the House of Representatives by Representative Dante Fascell (D.-Fla.) on August 17. Patterned after the philosophy behind the Freedom of Information Act (5 U.S.C. 552), the bills provided that "all meetings (including meetings to conduct hearings) of any government agency at which any official action is considered or discussed shall be open to the public" and then set forth four categories of exception: national security matters, internal management questions, situations with a potential for adverse effect upon an individual's character or reputation, or subjects required to be kept confidential under specific statutory authority. The open meetings provisions also extended to congressional committee proceedings. Transcripts of open meeting deliberations were required and judicial remedy was established in the event a dispute arose over the propriety and/or legality of closing a meeting.

Neither House took action on the measures in the 92d Congress. With the opening of the 93d Congress, the measure was again introduced in the House (H.R. 4) by Representative Fascell on January 3, 1973. A modified and expanded version of the original proposal was offered (S. 260) by Senator Chiles and 17 bi-partisan co-sponsors on January 9.[2] A version of the enlarged bill was subsequently introduced (H.R. 10000) in the House by Representative Fascell on August 3, and it eventually gained almost 50 co-sponsors from both political parties.

Expansion of the original measure included the addition of a policy definition of "national security" as utilized in the bill; more detailed procedure regarding opening and closing meetings of both congressional committees and Executive Branch multimember administrative agencies; inclusion of certain types of law enforcement information, trade secrets, and financial or commercial information as subjects exempt from mandatory disclosure in open meetings; and a new provision prohibiting ex parte communications between agency decision-makers and all persons outside the agency where the purpose of the contact is to discuss the merits of any matter being formally adjudicated by the agency, any rulemaking proceeding or any proceeding to prepare an environmental impact statement.

Referred to the Senate Committee on Government Operations, the Sunshine bill was assigned to the Subcommittee on Reorganization, Research, and International Organizations, chaired by Senator Abraham Ribicoff (D.-Conn.), for consideration. In July 1974, the subcommittee sent a questionnaire to a variety of experts—attorneys, public administrators, political scientists, public interest policy organiza-

[1] See Congressional Record, v. 118, August 4, 1972 S12794–S12811.
[2] See Ibid., v. 119, January 9, 1973: S373–S377.

tions, State officials, editors and journalists—soliciting their views on the bill. These responses were compiled in December and published for use in considering the Sunshine proposal.[3]

During the early stages of the 2d session of the 93d Congress, the Reorganization Subcommittee, with Senator Chiles as acting Chairman, received testimony on the bill from a number of witnesses. Public officials testifying at that time included Senator Charles Percy (R.-Ill.), Senator William Roth (R.-Del.), Senator Dick Clark (D.-Iowa), Representative Bill Gunter (D.-Fla.), Representative Dante Fascell (D.-Fla.), and Governor Reubin Askew of Florida. Others appearing during the spring hearings included Charles S. Rowe, Bill Mullen, and Theodore S. Serrill, representing the National Newspaper Association; John Gardner and David Cohen, appearing on behalf of Common Cause; pollster Lou Harris; Ron Plesser, a staff attorney with Ralph Nader's Center for the Study of Responsive Law; and Jeanne Malchon, former State president of the League of Women Voters of Florida.

On October 15, the subcommittee heard from agency officials representing the particular views of such agencies as the Interstate Commerce Commission, Civil Aeronautics Board, Securities and Exchange Commission, and Federal Communications Commission. Other witnesses included representatives from the Administrative Conference of the United States, spokesmen from the Radio-TV News Directors Association, Douglas Q. Wickham, Professor of law at the University of Tennessee Law School, and John B. Adams, Dean of the University of North Carolina Journalism School.[4]

In the 94th Congress the legislation was introduced by Senator Chiles with two dozen bi-partisan co-sponsors on January 15, 1975. The bill (S. 5) was first referred to the Subcommittee on Federal Spending Practices, Efficiency and Open Government of the Committee on Government Operations, and subsequently reported by that subcommittee on May 12. The bill was reported (S. Rept. 94–354) by the full committee with amendments by a unanimous vote on July 9.[5]

Certain procedural requirements contained in the original bill regarding the closing of meetings were modified. In addition, the scope of the bill was modified to cover only those multiheaded agencies headed by officials appointed by the President with the advice and consent of the Senate. Amendments were added specifying additional grounds justifying a closed meeting.

Rather than requiring an agency to maintain a transcript of electronic recording of all its meetings, the bill was amended to require a verbatim transcript only of those meetings closed to the public. Meetings discussing cases in adjudication were exempted from the transcript requirements in all instances. Other amendments pertained to preventing district courts from overturning substantive agency action taken at a meeting improperly closed to the public and an ex parte provision limited to apply only to formal on-the-record agency proceedings.

---

[3] See U.S. Congress. Senate. Committee on Government Operations. Government in the Sunshine: Responses to Subcommittee Questionnaire. Committee print, 93d Congress, 1st sess. Washington. U.S. Govt. Print. Off., 1974. 128 pp.

[4] See U.S. Congress. Senate. Committee on Government Operations. Government in the Sunshine. Hearings. 93d Congress, 2d session. May 21 and 22; and October 15, 1974. Washington. U.S. Govt. Print. Off., 1974. 397 p.

[5] U.S. Congress. Senate. Committee on Government Operations. Government in the Sunshine. Washington, U.S. Govt. Print. Off., 1975. 62 p. (94th Congress, 1st session. Senate. Report No. 94–354) [infra, p. 193].

Other provisions clarifying the relationship between the Sunshine bill and the Freedom of Information Act and the Privacy Act were also adopted. Due to the impact of the proposal on congressional procedures and its ex parte communications provision amending the Administrative Procedure Act, the measure was referred to the Committee on Rules and Administration and the Committee on the Judiciary, respectively. No additional hearings were held by either committee.

The Committee on Rules and Administration reported the bill (S. Rept. 94–381) on September 18.[6] By a 8–0 vote, the Committee on Rules and Administration removed the congressional title (title I) of the Sunshine proposal before reporting it, stating that, with regard to open meeting procedure, "in respect to congressional committees such purpose would more properly be achieved by direct amendment of the Standing Rules of the Senate rather than by amendment of the Legislative Reorganization Act of 1946." Title II of the bill was left unchanged. The Committee on Rules and Administration concurrently reported (S. Rept. 94–382), a resolution (S. Res. 9) amending the rules of the Senate regarding open committee meetings, and it was subsequently adopted by that chamber on November 5. The Rules Committee Report was also filed on behalf of the Judiciary Committee which agreed "to report the bill with the reservation of the right to file on the floor of the Senate proposed amendments to this legislation at a later date." On the first day of discussion, it was agreed to treat as original text on the floor the Rules Committee version of the bill in which the congressional title was deleted.[7]

During the course of deliberations on the measure the following day, the bill was passed with an amendment providing that financial regulatory agencies not be required to have open meetings when there is danger of "significant" financial speculation. The previous language used the term "serious" financial speculation. Another technical amendment was agreed to which was intended to conform the legislation to the Administrative Procedure Act. At the conclusion of these deliberations, the Senate approved the bill on a 94–0 roll call vote.

In the House, a companion to Senator Chiles' Sunshine proposal (S. 5) was first introduced (H.R. 466) by Representative Don Fuqua (D.-Fla.) on January 14, 1975. A modification of the Chiles bill, devoid of the congressional title, was offered (H.R. 5075) by Representative Dante Fascell (D.-Fla.) on March 18. Later, on September 26, Representative Fascell introduced another version of this legislation (H.R. 9868), reflective of changes in the bill as reported by the Senate Committee on Government Operations.

On October 22, Representative Bella Abzug (D.-N.Y.), Chairwoman of the Subcommittee on Government Information and Individual Rights of the Committee on Government Operations, introduced a revised version of the Fascell measure (H.R. 10315). This proposal and the latter Fascell bill were referred to the House Committee on Government Operations where they were assigned to Representative Abzug's subcommittee for consideration.

---

[6] U.S. Congress. Senate. Committee on Rules and Administration. Government in the Sunshine Act. Washington, U.S. Govt. Print. Off., 1975. 3 p. (94th Congress, 1st session. Senate. Report No. 94–381) [infra, p. 315].

[7] See Congressional Record, v. 121, November 5, 1975: S. 19337–S19372 [Infra, p. 318].

Hearings on Sunshine legislation were held by the Subcommittee on Government Information and Individual Rights on November 6 and 12. In addition to a variety of statements and materials submitted for the record, testimony was received from spokespersons for the Association of the Bar for the City of New York, the American Bar Association, Common Cause, and two publications—Advertising Age and the Nashville Tennessean. Representative Fascell made a presentation before the panel, as did officials from the Federal Reserve System, the Securities and Exchange Commission, the Justice Department, the Federal Communications Commission, and the Consumer Product Safety Commission.[8]

Following the hearings before the Abzug subcommittee, and in response to some of the suggestions made at those hearings, a revised version of the legislation (H.R. 11007) was introduced by Representative Abzug on December 4. The subcommittee marked up the new bill on December 15, 16, and 17, 1975, and January 20 and 21, 1976. The final subcommittee version included a provision overturning a Supreme Court decision (*Administrator, FAA* v. *Robertson*, 422 U.S. 255 (1975)) regarding the third exemption of the Freedom of Information Act (5 U.S.C. 552(b)(3)), so that it would exempt from disclosure only material required to be withheld from the public by a statute establishing particular criteria or referring to particular types of information (the *Robertson* decision had held that the existing exemption included a statute permitting or requiring withholding, regardless of whether it contained specific criteria therefor).

The subcommittee version was introduced as a clean bill (H.R. 11656) by Representative Abzug and 24 other sponsors from both parties on February 3, 1976. This measure was ordered reported (H. Rept. 94–880, Part I) by the full Committee on Government Operations on March 2 by a 32–7 vote.[9]

At the direction of the Speaker of the House, the bill was then referred to the Committee on the Judiciary. The Subcommittee on Administrative Law and Governmental Relations held hearings on March 24 and 25.[10] Thereafter, certain amendments to the legislation were proposed by this panel. The full Judiciary Committee favorably reported (H. Rept. 94–880, Part II) the proposal, as amended, by a voice vote on April 6.[11]

The measure was debated under an open rule (H. Res. 1207) in the House on July 28. Prior to adopting the bill by a yea-and-nay vote of 390–5, the chamber agreed to an amendment in the nature of a substitute incorporating all of the recommendations of the panels reporting the proposal. Various other amendments were agreed to, including one eliminating the requirement for transcripts of closed meetings, one applying the bill's exemptions to meetings of advisory com-

---

[8] See U.S. Congress. House. Committee on Government Operations. Government in the Sunshine. Hearings. 94th Cong., 1st sess. November 6 and 12, 1975. Washington, U.S. Govt. Print. Off., 1975. 565 pp.

[9] U.S. Congress. House. Committee on Government Operations. *Government in the Sunshine Act*. Washington, U.S. Govt. Print. 40 p. (94th Congress, 2d session. House. Report No. 94–880, Part I) [infra, p. 512].

[10] See U.S. Congress. House. Committee on the Judiciary. *Government in the Sunshine Act*. Hearings, 94th Congress. 2d Session. March 24 and 25, 1976. Washington, U.S. Govt. Print. Off., 1976. 72 pp.

[11] U.S. Congress. House. Committee on the Judiciary. *Government in the Sunshine Act*. Washington, U.S. Govt. Print. Off., 1976. 48 p. (94th Congress, 2d session. House. Report No. 94–880, Part II) [infra, p. 551].

mittees as well as agencies, and one narrowing somewhat the amendment to the third exemption of the Freedom of Information Act. Subsequently, this passage was vacated, and S. 5 was passed in lieu of the House bill after being amended to contain the language of the House version as enacted.[12] A conference was then called on the differing proposals.[13]

Meeting on August 5, the conference committee, chaired by House Government Operations Committee Chairman Jack Brooks (D.-Tex.) and drawn from the membership of the two Committees on Government Operations and the House Committee on the Judiciary, resolved 9 major and 38 minor points of disagreement between the two proposals. [14] Among the principal differences settled were an understanding of "meeting".

The Senate version defined meeting to mean "the deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations concern the joint conduct of disposition of official agency business." The House defined meeting to mean "a gathering to jointly conduct or dispose of agency business by two or more but at least the number of individual agency members required to take action on behalf of the agency." The compromise version defined "meeting" to mean "the deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations determine or result in the joint conduct or disposition of agency business", but not deliberations to take action to open or close a meeting, or to release or withhold information under certain sections of the Act. (The joint statement of the committee of conference noted that the definition of "meeting" is meant to include conference telephone calls if they involve the requisite number of members and otherwise come within the definition.)

The conference also resolved that, unless otherwise provided in the statute, every portion of every meeting of an agency within the scope of the Sunshine Act, including a subdivision, shall be open to public observation. The joint statement of the committee of conference noted that this provision is intended "to guarantee that ample space, sufficient visibility, and adequate acoustics will be provided."

Section 5(b) of the conference substitute amends the third exemption in the Freedom of Information Act, 5 U.S.C. 552(b), to include information "specifically exempted from disclosure by statute (other than section 552b of this title) provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld."

In considering the Sunshine Act exemption (5 U.S.C. 552b(c)(3)) and accompanying provision amending the comparable Freedom of Information Act exemption (5 U.S.C. 522(b)(3)) pertaining to statutes restricting the disclosure of information, the conference indicated these modifications apply only to a statute that either "requires that the information be withheld from the public in such a manner

---

[12] See Congressional Record, v. 122, July 28, 1976: H7863–H7902, [infra, p. 595].
[13] See Congressional Record, v. 122, July 29, 1976: S. 12839; Ibid., August 3, 1976: H8228, [infra, pp. 727].
[14] See Staff Conference Memorandum [infra, p. 773].

as to leave no discretion on the issue, or (B) Establishes particular criteria for withholding or refers to particular types of information to be withheld."

> . . . The conferees intend this language to overrule the decision of the Supreme Court in *Administrator, FAA* v. *Robertson*, 422 U.S. 255 (1975), which dealt with section 1104 of the Federal Aviation Act of 1958 (49 U.S.C. 1504). Another example of a statute whose terms do not bring it within this exemption is section 1106 of the Social Security Act (42 U.S.C. 1306).[15]

In the matter of transcripts, recordings, and minutes of meetings, the conference substitute provides that transcripts, verbatim recordings, or in some cases detailed minutes, must be made of all meetings closed to the public. According to the Joint Statement of the Committee of Conference, the Act:

> requires that before a meeting may be closed the General Counsel or chief legal officer of the agency must certify that, in his or her opinion, the meeting may properly be closed and state each relevant exemptive provision. A copy of such certification, together with a statement from the presiding officer of the meeting setting forth the date, time, and place of the meeting, and the persons present, shall be retained by the agency as part of the transcript, recording, or minutes of the meeting.
>
> The agency shall make a verbatim transcript or electronic recording of each meeting or portion closed to the public, except that for a meeting closed under exemptions (8) (bank reports), (9)(A) (information likely to lead to financial speculation), and (10) (adjudicatory proceedings or civil actions), the agency may elect to make either a transcript, a recording, or minutes. If minutes are kept, they must fully and clearly describe all matters discussed, provide a full and accurate summary of any actions taken and the reasons expressed therefore, and include a description of each of the views expressed on any item. The minutes must also reflect the vote of each member on any roll call vote taken during the proceedings and must identify all documents considered at the meeting.[16]

Transcripts, recordings, or minutes of meetings governed by the Sunshine Act and not exempt from disclosure by the Act must be made promptly available to the public. The statement of managers provided:

> Copies of the nonexempt portions of the transcript, or minutes, or a transcription of the recording disclosing the identity of each speaker, must be furnished to any person at the actual cost of duplication or transcription.
>
> The complete transcript, minutes, or recording of a closed meeting is to be maintained by the agency for at least two

---

[15] U.S. Congress. Senate, Committee of Conference. Government in the Sunshine, Washington, U.S. Govt. Print. Off., 1976, 94th Congress, 2d session, Senate. Report No. 94–1178, p. 14. [an identical version of the conference report was filed in the House as H. Rept. 94–1441] [infra. p. 783–812].

[16] Ibid., pp. 19–20 [infra. p. 801–802].

years after the meeting or one year after the conclusion of the agency proceeding which was the subject of the meeting, whichever occurs later.[17]

The conference reconciled differences on the issue of attorney fees by adopting a provision granting the courts the authority "to assess against any party reasonable attorney fees and other litigation costs reasonably incurred by any other party who substantially prevails" in an action taken under the Sunshine Act.[18] Costs may be assessed against a plaintiff only when such a suit has been instituted for frivolous or dilatory purposes. Assessments against an agency may be drawn from the Treasury of the United States. The conferees dropped a Senate provision that would have made an agency commissioner personally liable for the expenses of litigation where the commissioner was found to have violated the Act intentionally and repeatedly.

The conference report was filed in the House (H. Rept. 94–1441) on August 26 and in the Senate (S. Rept. 94–1178) the following day.[19] On August 31, the House, on the motion of Representative Jack Brooks (D.–Tex.) Chairman of the House Government Operations Committee, agreed to the conference report by a 384–0 yea-and-nay vote and the Senate agreed to it by voice vote, clearing the proposal for the President's signature.[20]

The President signed the bill (P.L. 94–409) on September 13, 1976.[21]

---

[17] Ibid., p. 20 [infra, p. 802].

[18] See *Alyeska Pipeline Service Company* v. *Wilderness Society*, 421 U.S. 240 (1975).

[19] See Congressional Record, v. 122, August 26, 1976: H9137–H9145; Ibid.; August 27, 1976: S14709 [813–827].

[20] See Ibid., August 31, 1976; H9258–H9262, S15043–S15045 [infra, pp. 813–827].

[21] 90 Stat. 1241 [infra, pp. 8–15]; See Weekly Compilation of Presidential Documents, v. 12, September 20, 1976: 1333–1334 [infra, pp. 831–832].

Public Law 94-409
94th Congress, S. 5
September 13, 1976

An Act

To provide that meetings of Government agencies shall be open to the public, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Government in the Sunshine Act".

Government in the Sunshine Act. 5 USC 552b note.

DECLARATION OF POLICY

SEC. 2. It is hereby declared to be the policy of the United States that the public is entitled to the fullest practicable information regarding the decisionmaking processes of the Federal Government. It is the purpose of this Act to provide the public with such information while protecting the rights of individuals and the ability of the Government to carry out its responsibilities.

5 USC 552b note.

OPEN MEETINGS

SEC. 3. (a) Title 5, United States Code, is amended by adding after section 552a the following new section:

"§ 552b. Open meetings

5 USC 552b. Definitions.

"(a) For purposes of this section—

"(1) the term 'agency' means any agency, as defined in section 552(e) of this title, headed by a collegial body composed of two or more individual members, a majority of whom are appointed to such position by the President with the advice and consent of the Senate, and any subdivision thereof authorized to act on behalf of the agency;

5 USC 552.

"(2) the term 'meeting' means the deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations determine or result in the joint conduct or disposition of official agency business, but does not include deliberations required or permitted by subsection (d) or (e); and

"(3) the term 'member' means an individual who belongs to a collegial body heading an agency.

(b) Members shall not jointly conduct or dispose of agency business other than in accordance with this section. Except as provided in subsection (c), every portion of every meeting of an agency shall be open to public observation.

"(c) Except in a case where the agency finds that the public interest requires otherwise, the second sentence of subsection (b) shall not apply to any portion of an agency meeting, and the requirements of subsections (d) and (e) shall not apply to any information pertaining to such meeting otherwise required by this section to be disclosed to the public, where the agency properly determines that such portion or portions of its meeting or the disclosure of such information is likely to—

"(1) disclose matters that are (A) specifically authorized under criteria established by an Executive order to be kept secret in the

interests of national defense or foreign policy and (B) in fact properly classified pursuant to such Executive order;

"(2) relate solely to the internal personnel rules and practices of an agency;

"(3) disclose matters specifically exempted from disclosure by statute (other than section 552 of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

5 USC 552.

"(4) disclose trade secrets and commercial or financial information obtained from a person and privileged or confidential;

"(5) involve accusing any person of a crime, or formally censuring any person;

"(6) disclose information of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy;

"(7) disclose investigatory records compiled for law enforcement purposes, or information which if written would be contained in such records, but only to the extent that the production of such records or information would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;

"(8) disclose information contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions;

"(9) disclose information the premature disclosure of which would—

"(A) in the case of an agency which regulates currencies, securities, commodities, or financial institutions, be likely to (i) lead to significant financial speculation in currencies, securities, or commodities, or (ii) significantly endanger the stability of any financial institution; or

"(B) in the case of any agency, be likely to significantly frustrate implementation of a proposed agency action.

except that subparagraph (B) shall not apply in any instance where the agency has already disclosed to the public the content or nature of its proposed action, or where the agency is required by law to make such disclosure on its own initiative prior to taking final agency action on such proposal; or

"(10) specifically concern the agency's issuance of a subpena, or the agency's participation in a civil action or proceeding, an action in a foreign court or international tribunal, or an arbitration, or the initiation, conduct, or disposition by the agency of a particular case of formal agency adjudication pursuant to the procedures in section 554 of this title or otherwise involving a determination on the record after opportunity for a hearing.

5 USC 554.

80-459 O - 77 - 2

"(d)(1) Action under subsection (c) shall be taken only when a majority of the entire membership of the agency (as defined in subsection (a)(1)) votes to take such action. A separate vote of the agency members shall be taken with respect to each agency meeting a portion or portions of which are proposed to be closed to the public pursuant to subsection (c), or with respect to any information which is proposed to be withheld under subsection (c). A single vote may be taken with respect to a series of meetings, a portion or portions of which are proposed to be closed to the public, or with respect to any information concerning such series of meetings, so long as each meeting in such series involves the same particular matters and is scheduled to be held no more than thirty days after the initial meeting in such series. The vote of each agency member participating in such vote shall be recorded and no proxies shall be allowed. Recorded voting.

"(2) Whenever any person whose interests may be directly affected by a portion of a meeting requests that the agency close such portion to the public for any of the reasons referred to in paragraph (5), (6), or (7) of subsection (c), the agency, upon request of any one of its members, shall vote by recorded vote whether to close such meeting.

"(3) Within one day of any vote taken pursuant to paragraph (1) or (2), the agency shall make publicly available a written copy of such vote reflecting the vote of each member on the question. If a portion of a meeting is to be closed to the public, the agency shall, within one day of the vote taken pursuant to paragraph (1) or (2) of this subsection, make publicly available a full written explanation of its action closing the portion together with a list of all persons expected to attend the meeting and their affiliation. Copies, availability.

"(4) Any agency, a majority of whose meetings may properly be closed to the public pursuant to paragraph (4), (8), (9)(A), or (10) of subsection (c), or any combination thereof, may provide by regulation for the closing of such meetings or portions thereof in the event that a majority of the members of the agency votes by recorded vote at the beginning of such meeting, or portion thereof, to close the exempt portion or portions of the meeting, and a copy of such vote, reflecting the vote of each member on the question, is made available to the public. The provisions of paragraphs (1), (2), and (3) of this subsection and subsection (e) shall not apply to any portion of a meeting to which such regulations apply: *Provided*, That the agency shall, except to the extent that such information is exempt from disclosure under the provisions of subsection (c), provide the public with public announcement of the time, place, and subject matter of the meeting and of each portion thereof at the earliest practicable time. Meeting closure, regulation. Public announcement.

"(e)(1) In the case of each meeting, the agency shall make public announcement, at least one week before the meeting, of the time, place, and subject matter of the meeting, whether it is to be open or closed to the public, and the name and phone number of the official designated by the agency to respond to requests for information about the meeting. Such announcement shall be made unless a majority of the members of the agency determines by a recorded vote that agency business requires that such meeting be called at an earlier date, in which case the agency shall make public announcement of the time, place, and subject matter of such meeting, and whether open or closed to the public, at the earliest practicable time. Scheduling, public announcement.

"(2) The time or place of a meeting may be changed following the public announcement required by paragraph (1) only if the agency publicly announces such change at the earliest practicable time. The Scheduling changes, public announcement.

subject matter of a meeting, or the determination of the agency to open or close a meeting, or portion of a meeting, to the public, may be changed following the public announcement required by this subsection only if (A) a majority of the entire membership of the agency determines by a recorded vote that agency business so requires and that no earlier announcement of the change was possible, and (B) the agency publicly announces such change and the vote of each member upon such change at the earliest practicable time.

Scheduling notice, publication in Federal Register.

"(3) Immediately following each public announcement required by this subsection, notice of the time, place, and subject matter of a meeting, whether the meeting is open or closed, any change in one of the preceding, and the name and phone number of the official designated by the agency to respond to requests for information about the meeting, shall also be submitted for publication in the Federal Register.

Closed meetings, certification.

"(f)(1) For every meeting closed pursuant to paragraphs (1) through (10) of subsection (c), the General Counsel or chief legal officer of the agency shall publicly certify that, in his or her opinion, the meeting may be closed to the public and shall state each relevant exemptive provision. A copy of such certification, together with a statement from the presiding officer of the meeting setting forth the time and place of the meeting, and the persons present, shall be retained by the agency. The agency shall maintain a complete transcript or electronic recording adequate to record fully the proceedings of each meeting, or portion of a meeting, closed to the public, except that in the case of a meeting, or portion of a meeting, closed to the public pursuant to paragraph (8), (9)(A), or (10) of subsection (c), the agency shall maintain either such a transcript or recording, or a set of minutes. Such minutes shall fully and clearly describe all matters discussed and shall provide a full and accurate summary of any actions taken, and the reasons therefor, including a description of each of the views expressed on any item and the record of any rollcall vote (reflecting the vote of each member on the question). All documents considered in connection with any action shall be identified in such minutes.

Transcripts, recordings or minutes.

Public availability.

"(2) The agency shall make promptly available to the public, in a place easily accessible to the public, the transcript, electronic recording, or minutes (as required by paragraph (1)) of the discussion of any item on the agenda, or of any item of the testimony of any witness received at the meeting, except for such item or items of such discussion or testimony as the agency determines to contain information which may be withheld under subsection (c). Copies of such transcript, or minutes, or a transcription of such recording disclosing the identity of each speaker, shall be furnished to any person at the actual cost of duplication or transcription. The agency shall maintain a complete verbatim copy of the transcript, a complete copy of the minutes, or a complete electronic recording of each meeting, or portion of a meeting, closed to the public, for a period of at least two years after such meeting, or until one year after the conclusion of any agency proceeding with respect to which the meeting or portion was held, whichever occurs later.

Retention.

Regulations. Notice, publication in Federal Register.

"(g) Each agency subject to the requirements of this section shall, within 180 days after the date of enactment of this section, following consultation with the Office of the Chairman of the Administrative Conference of the United States and published notice in the Federal Register of at least thirty days and opportunity for written comment by any person, promulgate regulations to implement the requirements

of subsections (b) through (f) of this section. Any person may bring a proceeding in the United States District Court for the District of Columbia to require an agency to promulgate such regulations if such agency has not promulgated such regulations within the time period specified herein. Subject to any limitations of time provided by law, any person may bring a proceeding in the United States Court of Appeals for the District of Columbia to set aside agency regulations issued pursuant to this subsection that are not in accord with the requirements of subsections (b) through (f) of this section and to require the promulgation of regulations that are in accord with such subsections.

Judicial proceeding.

"(h)(1) The district courts of the United States shall have jurisdiction to enforce the requirements of subsections (b) through (f) of this section by declaratory judgment, injunctive relief, or other relief as may be appropriate. Such actions may be brought by any person against an agency prior to, or within sixty days after, the meeting out of which the violation of this section arises, except that if public announcement of such meeting is not initially provided by the agency in accordance with the requirements of this section, such action may be instituted pursuant to this section at any time prior to sixty days after any public announcement of such meeting. Such actions may be brought in the district court of the United States for the district in which the agency meeting is held or in which the agency in question has its headquarters, or in the District Court for the District of Columbia. In such actions a defendant shall serve his answer within thirty days after the service of the complaint. The burden is on the defendant to sustain his action. In deciding such cases the court may examine in camera any portion of the transcript, electronic recording, or minutes of a meeting closed to the public, and may take such additional evidence as it deems necessary. The court, having due regard for orderly administration and the public interest, as well as the interests of the parties, may grant such equitable relief as it deems appropriate, including granting an injunction against future violations of this section or ordering the agency to make available to the public such portion of the transcript, recording, or minutes of a meeting as is not authorized to be withheld under subsection (c) of this section.

Jurisdiction.

Civil actions.

Relief.

"(2) Any Federal court otherwise authorized by law to review agency action may, at the application of any person properly participating in the proceeding pursuant to other applicable law, inquire into violations by the agency of the requirements of this section and afford such relief as it deems appropriate. Nothing in this section authorizes any Federal court having jurisdiction solely on the basis of paragraph (1) to set aside, enjoin, or invalidate any agency action (other than an action to close a meeting or to withhold information under this section) taken or discussed at any agency meeting out of which the violation of this section arose.

Inquiry.

"(i) The court may assess against any party reasonable attorney fees and other litigation costs reasonably incurred by any other party who substantially prevails in any action brought in accordance with the provisions of subsection (g) or (h) of this section, except that costs may be assessed against the plantiff only where the court finds that the suit was initiated by the plantiff primarily for frivolous or dilatory purposes. In the case of assessment of costs against an agency, the costs may be assessed by the court against the United States.

Litigation costs, assessment.

"(j) Each agency subject to the requirements of this section shall annually report to Congress regarding its compliance with such requirements, including a tabulation of the total number of agency

Report to Congress.

meetings open to the public, the total number of meetings closed to the public, the reasons for closing such meetings, and a description of any litigation brought against the agency under this section, including any costs assessed against the agency in such litigation (whether or not paid by the agency).

"(k) Nothing herein expands or limits the present rights of any person under section 552 of this title, except that the exemptions set forth in subsection (c) of this section shall govern in the case of any request made pursuant to section 552 to copy or inspect the transcripts, recordings, or minutes described in subsection (f) of this section. The requirements of chapter 33 of title 44, United States Code, shall not apply to the transcripts, recordings, and minutes described in subsection (f) of this section.

5 USC 552.

44 USC 3301.

"(l) This section does not constitute authority to withhold any information from Congress, and does not authorize the closing of any agency meeting or portion thereof required by any other provision of law to be open.

"(m) Nothing in this section authorizes any agency to withhold from any individual any record, including transcripts, recordings, or minutes required by this section, which is otherwise accessible to such individual under section 552a of this title.".

5 USC 552a.

(b) The chapter analysis of chapter 5 of title 5, United States Code, is amended by inserting:

5 USC prec. 500.

"552b. Open meetings."

immediately below:

"552a. Records about individuals.".

EX PARTE COMMUNICATIONS

SEC. 4. (a) Section 557 of title 5, United States Code, is amended by adding at the end thereof the following new subsection:

"(d)(1) In any agency proceeding which is subject to subsection (a) of this section, except to the extent required for the disposition of ex parte matters as authorized by law—

"(A) no interested person outside the agency shall make or knowingly cause to be made to any member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, an ex parte communication relevant to the merits of the proceeding;

"(B) no member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, shall make or knowingly cause to be made to any interested person outside the agency an ex parte communication relevant to the merits of the proceeding;

"(C) a member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of such proceeding who receives, or who makes or knowingly causes to be made, a communication prohibited by this subsection shall place on the public record of the proceeding:

"(i) all such written communications;

"(ii) memoranda stating the substance of all such oral communications; and

"(iii) all written responses, and memoranda stating the substance of all oral responses, to the materials described in clauses (i) and (ii) of this subparagraph;

"(D) upon receipt of a communication knowingly made or knowingly caused to be made by a party in violation of this subsection, the agency, administrative law judge, or other employee presiding at the hearing may, to the extent consistent with the interests of justice and the policy of the underlying statutes, require the party to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation; and

"(E) the prohibitions of this subsection shall apply beginning at such time as the agency may designate, but in no case shall they begin to apply later than the time at which a proceeding is noticed for hearing unless the person responsible for the communication has knowledge that it will be noticed, in which case the prohibitions shall apply beginning at the time of his acquisition of such knowledge. Applicability.

"(2) This subsection does not constitute authority to withhold information from Congress.".

(b) Section 551 of title 5, United States Code, is amended—

(1) by striking out "and" at the end of paragraph (12);

(2) by striking out the "act." at the end of paragraph (13) and inserting in lieu thereof "act; and"; and

(3) by adding at the end thereof the following new paragraph:

"(14) 'ex parte communication' means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports on any matter or proceeding covered by this subchapter.". "Ex parte communication."

(c) Section 556(d) of title 5, United States Code, is amended by inserting between the third and fourth sentences thereof the following new sentence: "The agency may, to the extent consistent with the interests of justice and the policy of the underlying statutes administered by the agency, consider a violation of section 557(d) of this title sufficient grounds for a decision adverse to a party who has knowingly committed such violation or knowingly caused such violation to occur.". 5 USC 557.

CONFORMING AMENDMENTS

SEC. 5. (a) Section 410(b)(1) of title 39, United States Code, is amended by inserting after "Section 552 (public information)," the words "section 552a (records about individuals), section 552b (open meetings),".

(b) Section 552(b)(3) of title 5, United States Code, is amended to read as follows:

"(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;".

(c) Subsection (d) of section 10 of the Federal Advisory Committee Act is amended by striking out the first sentence and inserting in lieu thereof the following: "Subsections (a)(1) and (a)(3) of this section shall not apply to any portion of an advisory committee meeting where 5 USC app. I.

the President, or the head of the agency to which the advisory committee reports, determines that such portion of such meeting may be closed to the public in accordance with subsection (c) of section 552b of title 5, United States Code.".

EFFECTIVE DATE

5 USC 552b note.

SEC. 6. (a) Except as provided in subsection (b) of this section, the provisions of this Act shall take effect 180 days after the date of its enactment.

(b) Subsection (g) of section 552b of title 5, United States Code, as added by section 3(a) of this Act, shall take effect upon enactment.

Approved September 13, 1976.

LEGISLATIVE HISTORY:

HOUSE REPORTS: No. 94- 880, Pt. I and No. 94-880, Pt. 2, accompanying H.R. 11656 (Comm. on Government Operations) and No. 94-1441 (Comm. of Conference).

SENATE REPORTS: No. 94-354 (Comm. on Government Operations), No. 94-381 (Comm. on Rules and Administration) and No. 94-1178 (Comm. of Conference).

CONGRESSIONAL RECORD:

Vol. 121 (1975): Nov. 5, 6, considered and passed Senate.

Vol. 122 (1976): July 28, considered and passed House, amended, in lieu of H.R. 11656.

Aug. 31, House and Senate agreed to conference report.

WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS:

Vol. 12, No. 38 (1976): Sept. 13, Presidential statement.

SENATE ACTION

[From the Congressional Record—Senate, Aug. 4, 1972]

(S 12794–S 12811)

Introduction of S. 3881 by Senator Lawton Chiles, a U.S. Senator From the State of Florida

S. 3881. A bill to provide that meetings of government agencies and of congressional committees shall be open to the public, and for other purposes. Referred to the Committee on Government Operations.

FEDERAL GOVERNMENT IN THE SUNSHINE ACT

Mr. Chiles. Mr. President, in 1913, Supreme Court Justice Louis D. Brandeis wrote:

> Publicity is justly commended as a remedy for social and industrial disease. Sunlight is said to be the best disinfectant and electric light the most efficient policeman.

Justice Brandeis could just as well have applied these remedies to the governmental process, for democratic self-government and an informed citizenry just naturally go hand in hand, making essential the conduct of public business in the open, "in the sunshine." Only with such openness can the public judge and express, through its vote or voice, whether governmental decisions are just and fair.

Since I came to the Senate last year, I have become very disturbed by the great amount of public business I have found being conducted behind closed doors and by the attitude of secrecy I have seen in our Federal Government agencies. I am not surprised that people are suspicious of our motives and are losing confidence in their government when they are shut out of the decisionmaking process.

So, I am introducing the Federal "Government in the Sunshine Act", which seeks to assure the openness of our governmental processes and to restore public confidence in those processes. It seeks to do this through a simple requirement: all meetings of Federal authorities and congressional committees shall, subject to certain exemptions, be open to the public. Citizens will have the right to attend meetings in which they have a personal interest, and news media and other interested groups will have access which will insure a broader dissemination of information on public affairs.

The proposed law provides for open meetings of all Federal governmental authorities except the courts and the military. In particular, it applies to Federal regulatory agencies and commissions—such as the Interstate Commerce Commission, the Federal Trade Commission, and the Civil Aeronautics Board—which are responsible for serving the public interest. It would apply to the committees of Congress, which have for too long conducted too much of their business behind closed doors.

Mr. President, I ask unanimous consent to have the full text of the bill printed in the Record.

There being no objection, the bill was ordered to be printed in the Record, as follows:

92D CONGRESS
2D SESSION

S. 3881

IN THE SENATE OF THE UNITED STATES

AUGUST 4, 1972

Mr. CHILES introduced the following bill; which was read twice and referred to the Committee on Government Operations

A BILL

To provide that meetings of Government agencies and of congressional committees shall be open to the public, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 That (a) except as provided in subsection (b), all meet-
4 ings (including meetings to conduct hearings) of any Gov-
5 ernment agency at which any official action is considered
6 or discussed shall be open to the public.
7 (b) Subsection (a) shall not apply to that portion of
8 any meetings in which the action or proposed action to be
9 taken, considered, or discussed by an agency—

1 (1) relates to a matter affecting the national secu-
2 rity,
3 (2) relates solely to the internal management of
4 such agency,
5 (3) might tend to reflect adversely on the character
6 or reputation of any individual who is subject to any pro-
7 posed or potential sanction by such agency, or
8 (4) might divulge matters required to be kept con-
9 fidential under (specified statutory provisions):
10 *Provided*, That this subsection does not authorize closed
11 meetings or the withholding of information from the public
12 except as specifically stated in this subsection, and is not
13 authority to withhold information from Congress.
14 (c) Each agency subject to the requirements of this sec-
15 tion shall, within one hundred and eighty days after the
16 effective date of this Act, establish through publication in
17 the Federal Register procedures for providing public notice
18 of meetings required by this section to be open to the public.
19 Such notice shall be given as far in advance of such meetings
20 as is practicable, in order to facilitate attendance of such meet-
21 ings by persons desirous of doing so.
22 SEC. 2. (a) Section 133 (b) of the Legislative Reorga-
23 nization Act of 1946 as amended by section 103 (a) of the
24 Legislative Reorganization Act of 1970 is amended as fol-
25 lows:

1 "(1) Each meeting (including meetings to conduct
2 hearings) of each standing, select, special, or conference
3 committee of the Senate shall be open to the public, ex-
4 cept when the committee determines that the matters to
5 be discussed, or the testimony to be taken, relates to a
6 matter of national security, relates solely to the internal
7 management of such committee, may tend to reflect ad-
8 versely on the character or reputation of the witness or
9 any other individual, or may divulge matters required to
10 be kept confidential under other provisions of law."
11 (2) Clause 27 (f) (2) of rule XI of the Rules of the
12 House of Representatives is amended to read as follows:
13 "Each meeting (including meetings to conduct hear-
14 ings) of each standing, select, special, or conference com-
15 mittee shall be open to the public, except when the
16 committee determines that the matters to be discussed,
17 or the testimony to be taken, relates to a matter of na-
18 tional security, relates solely to the internal management
19 of such committee, may tend to reflect adversely on the
20 character or reputation of the witness or any other in-
21 dividual, or may divulge matters required to be kept
22 confidential under other provisions of law."
23 SEC. 3. A transcript shall promptly be made of each
24 meeting which is open to the public pursuant to the pro-

1 visions of this Act and copies of such transcript shall prompt-
2 ly be made available for public inspections and copying.
3 SEC. 4. The district courts of the United States shall
4 have original jurisdiction of actions to render declaratory
5 judgments or to enforce, by injunction or otherwise, the first
6 section of this Act and section 3 insofar as it relates to that
7 section. Such actions may be brought by any person in the
8 district where such person resides, or has his principal place
9 of business, or where the agency whose action is complained
10 of resides.
11 SEC. 5. DEFINITIONS.—For the purpose of this Act—
12 (1) "Government agency" means each authority of
13 the Government of the United States (whether or not it
14 is within or subject to review by another Government
15 agency) having more than one member, but does not
16 include—
17 (a) the Congress
18 (b) the courts of the United States
19 (c) military authorities.
20 (2) "person" includes an individual, partnership,
21 corporation, association, a public or private organization
22 other than an agency.
23 SEC. 6. This Act shall take effect on the ninetieth day
24 after the date of its enactment.

Mr. CHILES. Mr. President, the bill can be easily summarized.

Section 1 requires all meetings of Government agencies at which official action is taken, considered, or discussed to be open to the public, with certain exceptions. Exceptions would be in matters relating to national defense and security or any matters required by statute to be kept confidential; meetings related to an agency's internal management; and disciplinary proceedings which could adversely affect the reputation of an individual. This section would also require agencies to adopt procedures for providing the public with advance notice of meetings.

Section 2 requires that meetings of congressional committees shall be open to the public, with exceptions similar to those cited for meetings of Government agencies.

Section 3 requires that a transcript, available to the public, be made of meetings of Government agencies and congressional committees.

Section 4 provides for court enforcement of the open meeting requirement for Government agencies upon suit brought "by any person."

Section 5 defines agencies referred to in the act as all multimember Federal authorities other than the courts, Congress, or military authorities. This section also broadly defines the "person" who may seek court enforcement of the act's provisions.

Section 6 provides that the act shall be effective 90 days after enactment.

I would like to express my indebtedness to Prof. Richard B. Stewart of the Harvard University Law School for his expert counsel in the drafting of this measure.

There is good practical precedent among the States for a Federal open meeting law. I cite the examples of two States where sunshine is particularly abundant and where sunshine laws have been conducive to good government. California was one of the first States to enact an open hearing law; Florida passed a comprehensive "Government-in-the-Sunshine" Act in 1967, and since I was a member of the Florida Legislature at that time, I am especially familiar with it.

As early as 1953, the California Assembly enacted the Brown Act, which makes provision for open public meetings for all local government agencies—but not State government. The California attorney general also ruled that the act applies to legislative bodies of chartered cities. The case that brought forth that ruling was an instructive one, for it held invalid a San Diego Council resolution restricting attendance at "council conferences" by requiring citizens to register for the meetings and to agree to silence. The basis for that ruling is an eloquent statement of the case for sunshine laws:

> The right and ability of the people to have free and open access to all meetings of local legislative bodies is vital to the preservation of an informed electorate and constitutes an elemental safeguard to democratic government. The existence of devices, loopholes or subterfuges which tend to "cabin, crib or confine" the public from free access to the meetings and deliberations of their local governmental agencies is contrary to the public policy of this State.

The Brown Act states that all public entities in the State "exist to aid in the conduct of the people's business." It declares all meetings of a local legislative body or agency to be "open and public," with no conditions on attendance by the public. The time and place of regular

meetings are to be made known. Special meetings must be formally announced, with adequate notice given to the public and communications media. The law is rightly flexible, granting the right of public bodies to executive sessions, specifically in the case of personnel actions, certain complaint charges and matters affecting the national security. For those interested in basic research on the California Brown Act and its broader relation to the whole freedom of information question, I recommend the article, "Secrecy and the Access to Administrative Records" by Prof. Albert G. Pickerell, and I ask unanimous consent to have Professor Pickerell's article printed at this point in the record.

There being no objection, the article was ordered to be printed in the record, as follows:

Part V. Agencies and the Public: Secrecy and the Access to Administrative Records

(By Albert G. Pickerell)*

I. THE FEDERAL SCENE

Since 1948 newspaper editors have been expressing anxiety over a "growing tendency" of government officials to suppress public information.[1] In 1950 the American Society of Newspaper Editors authorized its Freedom of Information Committee (which previously had been primarily concerned with reducing barriers to the *international* flow of information) to undertake a general attack on the "undemocratic practice" of news suppression.[2] The chairman of the committee reported a short time later that a "nation-wide and incessant guerrilla warfare was being waged against our right of access to public information."[3] There is "arrogant suppression of news all over the place," he told the 1951 ASNE convention.[4] As a result a concerted campaign has been carried on by several newspaper organizations, especially the ASNE. At least four national associations have set up standing "freedom of information" committees,[5] and similar groups have been formed in many states to fight news suppression on state and local levels.

Numerous protests of withholding information of legitimate interest to the public have been lodged by these freedom of information committees as they sought, by a combination of publicity and legal action, to win broader access to public information. During the first half of 1953, for example, one group processed forty "major" cases, the "majority of which concerned secret government of one kind or another, or outright censorship by autocratic officials."[6]

In 1951 the ASNE commissioned Harold L. Cross, veteran New York newspaper attorney, to continue a preliminary study and to prepare a "comprehensive report on customs, laws and court decisions affecting our free access to information whether it is recorded on police blotters or in the fields of the national govern-

---

*Associate Prefessor of Journalism, University of California, Berkeley.

[1] See, *e.g.*, proceedings of the annual convention of the American Society of Newspaper Editors in Problems of Journalism 1948 150–51, 168–69. "Our responsibility lies in the domestic field as well as in the international field. . . ." Basil Walters, Bulletin of the ASNE, Oct. 1, 1948, p. 1.

[2] The problem of course is not a new one. "Every newspaperman is used to a nominal tussle over news that reflects some discredit on elected or employed public officials. . . . This is a conflict as old as government and news of government." James S. Pope, in Cross, The People's Right to Know xv (1953).

[3] Editor & Publisher, Jan. 27, 1951, p. 59.

[4] ASNE, Problems of Journalism 1951, p. 171.

[5] For reports of the ASNE see annual volumes of Problems of Journalism and the monthly Bulletin of the ASNE. Also taking part in the campaign have been the American Newspaper Publishers Association, the Associated Press Managing Editors Association (see annual volumes of the APME Red Book), Sigma Delta Chi, national journalistic fraternity (see its monthly publication, The Quill), and the National Editorial Association (see its monthly publication, The National Publisher).

[6] Newton, *A Growing Threat to Democracy: Secrecy in Government,* The Quill, Sept. 1953, p. 7. Eighteen formal protests were lodged; they included secret meetings of the Alameda, California, city council and a secret conference on ethical standards at the University of California. *Ibid.* See also *Report of Advancement of Freedom of Information Committee,* The Quill, Dec. 1954, p. 7.

ment."[7] The result was his *The People's Right to Know*, published in 1953, and hailed as a "manual of arms" for newspaper editors.[8]

The practice of news suppression has not been peculiar to any special type of information or limited to any particular branch of government. One California editor has commented: ". . . off-the-record statements by public officials are becoming a growing disease in this country. Because the President of the United States holds off-the-record conferences to supply background information, deputy sheriffs are doing likewise."[9]

Two executive orders (one by President Truman[10] and one by President Eisenhower[11] have been the cause of much criticism, as have the information policies of the Department of Defense and the tight rein on information imposed by Secretary Wilson's directive of March 29, 1955, which permitted release only of material that would "constitute a constructive contribution to the primary mission of the Department of Defense."[12] Numerous other governmental information policies have been strongly protested.[13]

The "freedom of information" campaign reached something a climax late in 1955 when a special House subcommittee under the chairmanship of Representative John E. Moss of California opened hearings on government information practices. The subcommittee, said Representative Moss, "will not be conducting an investigation but, rather, will be studying a vital problem."[14] As preparation for its task the group in August, 1955, sent a questionnaire to all federal executive and independent agencies.[15] Among other things, the replies revealed some 30 new classifications[16] that had been devised to keep information unrelated to security from being disclosed and apparently to circumvent the Presidential order which had limited classification of information to three defined categories, "top secret," "secret" and "confidential."[17] Hearings were held November 7–10 and concentrated on the Executive branch. A second set of hearings was conducted in January, 1956, centered on the regulatory agencies. Witnesses for the Civil Service Commission particularly drew heavy fire. The commission had replied to the subcommittee questionnaire thusly: "The authority of the Commission to deny access to or to furnish information from its records and files is based on the inherent power of the executive branch of the Government derived from the Constitution. . . ."[18] Both Commissioner Young and the agency's acting general counsel

---

[7] Cross, The People's Right to Know xv (1953).

[8] See also its 1953 CUM. SUPP. No. 1 (1954). For an illustration of the use of Cross' book to gain broader access to public information see Romm. *Opening Up the City Hall,* Nieman Reports, Jan. 1954, p. 8.

[9] The Publishers' Auxiliary, Feb. 16, 1952, p. 1.

[10] Exec. Order No. 10290, 16 FED. REG. 9795 (1951).

[11] Exec. Order No. 10501, 18 FED. REG. 7049 (1953). "We have found news somewhat harder to dig out under the present administration," W. L. Beale, Jr., chief of Washington bureau, Associated Press, quoted in Raymond, The People's Right to Know 48 (1955).

[12] Reprinted in 101 Cong. Rec. 11325 (daily ed. Aug. 3, 1955). See also New York Times, March 31, 1955, pp. 1, 16; April 7, 1955, p. 15; April 13, 1955, pp. 1, 11; Time Magazine, May 9, 1955, pp. 78–79; and Henkin, "Pentagon News Policies Irk U.S. Press," I.P.I. Report (International Press Institute, Zurich), Aug. 1955, p. 1.

[13] These include activities of the Office of Strategic Information in the Commerce Department; the Commerce Department's control of the export of technical data; an "excessive" number of secret meetings by congressional committees; and information policies of the Atomic Energy Commission. See, *e.g.,* reports of the ASNE subcommittee on Atomic Information in ASNE, PROBLEMS OF JOURNALISM 1952 and 1953 and an article by its chairman, Block, *The Fetish of Atomic Secrecy,* Harper's Magazine, Aug. 1953, p. 31. For general discussion by an edition of public information problems and restrictions see statement by Wiggins in *Hearings before the Subcommittee on Reorganization of the Senate Committee on Government Operations,* 84th Cong., 1st Sess., pp. 682–701 (1955). This statement also appears in ASNE, PROBLEMS OF JOURNALISM 1955, pp. 272–79. One of the most severely criticized administration policies has been the Eisenhower-to-Wilson letter of May 17, 1954, issued during the Army-McCarthy hearings, described by one newsman as "the greatest threat to freedom of the press in our time." Mollenhoff, *Is the Press Alert to a Dangerous Precedent On Executive Secrecy?* The Quill, Dec. 1955, p. 9. See also Mollenhoff, *A Precedent the Press Should Examine,* Nieman Reports, Jan. 1956, p. 28. "Never has so broad a power of executive right to withhold been asserted." Cross, Editor & Publisher, No. 26, 1955, p. 72.

[14] 101 CONG. REC. A6213 (daily ed. Aug. 25, 1955).

[15] The four-page questionnaire and the "unevaluated" replies from the agencies, along with the bulk of exhibits, has been issued as a 552-page committee print, *Replies from Federal Agencies to Questionnaire Submitted by the Special Subcommittee on Government Information of the House Committee on Government Operations,* 84th Cong., 1st Sess. (1955).

[16] For example, "for administrative use only," "for official distribution," "for staff use only," "administratively confidential," etc.

[17] Exec. Order No. 10501, 18 FED. REG. 7049 (1953).

[18] *Replies from Federal Agencies to Questionnaire Submitted by the Special Subcommittee on Government Information of the House Committee on Government Operations,* 84th Cong., 1st Sess. 83 (1955).

defended commission rulings that had kept secret such information as the names of eligible candidates for postmaster appointments. They maintained such authority was "inherent" in the Civil Service Act of 1949.[19]

Representative Moss expressed "amazement" that some agencies contended they had an "inherent power" to keep information from the public, describing it as a "fantastically new concept of law."[20] Officials of the agency asserted that they answered all "reasonable" requests for information. They insisted, however, that they alone had the right to judge what was "reasonable."[21] As a result of the hearings, there were indications the committee would take action to recommend changes in federal statutes. The Civil Service Commission has revised its public information regulations.[22]

Cross found the right of inspection on the federal level to be a "rare exception," in contradistinction from the law at state and municipal levels, where the right of inspection is the "general rule." He found there was no enforceable legal right to general inspection of federal non-judicial records, the availability thereof being a matter of official grace, indulgence or discretion.[23] Cross reported he had practiced newspaper law for 35 years without encountering a serious case of refusal of access to public records and proceedings. "Now," he commented in 1951, "scarcely a week goes by without a new refusal. The last five years brought more newspaper lawsuits to open records than in any previous twenty-five years."[24]

It is difficult to conceive of any branch of the law that does not require frequent examination of such public documents as police records, vital statistics, tax assessments, motor vehicle records and various other materials to which newspaper organizations have been seeking the right of access. As Justice Botein has pointed out:[25]

"The information stored in public records which the news reporter wants to inspect for possible publication may be the same information which the lawyer desires to inspect for possible use in a trial, in the preparation of legal documents, or in the myriad of functions he performs for clients."

The complexities and bigness of government alone make it increasingly difficult for the newsman to dig out information, especially information the public official is reluctant to disclose. As an indication of the problem facing the editor in his quest for "all the news that's fit to print," in San Francisco alone there are some 200 federal agency offices.[26]

The (London) *Economist* thus pictured a British senior civil servant if he had attended opening sessions of the Moss subcommittee hearings: ". . . he would have returned to Whitehall thankfully, like an explorer escaped from the Jibaro head-hunters."[27] The observations of the *Economist* illustrate sharply basic differences in the United States and England as to the relationship between public officials and the press, as well as differences in status of the contemporary press. Commented the *Economist;*[28]

"Nobody ventured to suggest that these self-elected guardians of the public interest were already getting more information from government departments than were the newspapermen of any other country in the world. Nobody seriously

---

[19] New York Times, Nov. 9, 1955, p. 39.

[20] Editor & Publisher, Nov. 19, 1955, p. 13. "We are amazed to learn that Congressman John E. Moss is 'amazed' that some government agencies believe they have an 'inherent' power to control information. This perverted notion that elected or appointed officials can decide what items of non-security information should be released to the public has been the root cause of news suppression at all levels of government. It has provided the basic reason for the Moss Committee investigation." Editor & Publisher, Nov. 26, 1955, p. 6.

[21] New York Times, Nov. 9, 1955, p. 39.

[22] Editor & Publisher, Jan. 28, 1955, p. 46; New York Times, Jan. 21, 1956, p. 8. In its opening hearings the committee "took a giant step toward the goal of clearing the channels of communications between Federaldom and the public." Marder, *Freedom of Information—a Giant Step Forward,* Bulletin of the ASNE, Dec. 1, 1955, p. 1. See also Editor & Publisher, Nov. 12, 1955, p. 10 and Nov. 19, 1955, p. 13; and Freedom of Information News Digest, Feb. 6, 1956 (an occasional, mimeographed publication distributed by the National Editorial Association, 222 N. Michigan Ave., Chicago).

[23] See Cross, The People's Right to Know 199–201 (1953) for listing of "several factors" (including five "legal doctrines") held responsible for the "state of the law." He deals in separate chapters with REV. STAT. § 161 (1875), 5 U.S.C. § 22 (1952), and the Administrative Procedure Act, 60 STAT. 243 (1946), 5 U.S.C. §§ 1001–11 (1952). He describes the former as having been "tortured into a barrier against the public interest" and a situation that "cried aloud for change." *Id.* at 222. He considers the latter as "abject failure" as far as making records available is concerned. New York Times, Dec. 18, 1955, p. 69.

[24] Quoted in Pope, *The Suppression of News,* Atlantic Monthly, July 1951, p. 51.

[25] Botein, Book Review, 67 HARV. L. REV. 920 (1954).

[26] San Francisco Chronicle, July 3, 1955, p. 6.

[27] The Economist (London), Nov. 19, 1955, p. 653.

[28] *Ibid.* But see Griffith, *The Crichel Down Affair,* 18 Modern L. Rev. 557, 568–69 (1955).

challenged the proposition that it was undemocratic and shameful to deny them more information. As for the idea, widely if not universally entertained in Whitehall, that government officials should be insulated from inquisitive newspapermen by press officers who should dispense whatever information the department chiefs think fit to give them and no more—that idea was too arrogant and fantastic to be mentioned at all."

Even within the United States there are many varying concepts of "freedom of information."[29] From a practical standpoint, they range from the somewhat idealistic and sometimes over-zealous position of newsmen[30] to the "inherent" powers of suppression claimed by some government officials. According to the charges, the suppression of public information takes many forms and stems from various motives. There is not room here for discussion of all these. One position is that the barriers are supported principally by public officials who have a basic contempt for the judgment and intellectual capacity of the American people.[31] Another is that censorship is used to cover up administrative mistakes and to prevent embarrassment.[32]

There is evidence that the complexities of governmental affairs and the continuing crises of the cold war have reduced the public's interest in public information and strengthened the idea that security is somehow served by secrecy. The efforts in recent years of newspaper editors to reduce the area of restricted information, says one observer, "may prove to be the necessary pioneer work of men with real vision of a grave national problem."[33] The American Civil Liberties Union published a study on the subject and expressed "rising concern" that government agencies were "narrowing 'the market-place of opinion.'"[34] But there has been little general concern, and newspaper editors themselves, in the opinion of some of their spokesmen, have in some instances not taken sufficient interest in the problem.[35] If the suppression of public information is as "arrogant" and "rampant" as some observers claim, the situation certainly presents a grave threat to the proper functioning of democratic processes.

II. THE CALIFORNIA PICTURE

In the winter of 1951 the Riverside *Press-Enterprise* learned that two drunk driving arrests had been made by the Riverside police department, the reports of which had been withheld from police records. Thus was the newly organized Freedom of Information committee of the California Newspaper Publishers Association (hereinafter referred to as the CNPA) provided with its first case of alleged news suppression.[36] Since then CNPA and its Freedom of Information committee have been active in this field, sponsoring legislation and lodging numerous complaints that information of a legitimate interest to the public was being concealed.[37] At the 1953 legislative session two bills dealing with access to public

---

[29] For discussion of distinguishable theories of functions and purpose of mass media see, *e.g.*, contributions by Siebert and Peterson in MASS MEDIA AND EDUCATION 13–53 (Henry ed. 1954); see also Siebert, Peterson and Schramm, The Four Theories of the Press (unpublished manuscript in Stanford University library, Division of Communication and Journalism, 1955); and Hocking, Freedom of the Press (1947).

[30] *E.g.*, "A free people cannot properly exercise their franchise unless they know the facts about the public business. And there can be no withholding of the facts about the public business on *any* score." Isaacs, The APME Red Book 1954, p. 187. *But cf.*, "I am beginning to wonder whether the initials ASNE do not really stand for 'American Society for No-restrictions Enywhere.' So vast is the flood of rhetoric and report about Freedom of Information, so frequent and so ferocious are the pronouncements of editors and publishers on the subject, that one is sometimes impelled to seek out a Noah to show the way into an ark of dry silence away from the deluge of declaration." Markel, Bulletin of the ASNE, March 1, 1956, p. 7. "Moderation, in my opinion, will accomplish much more for freedom of information than an evangelical campaign making extreme demands." Mathews, Bulletin of the ASNE, Nov. 1, 1954, pp. 3, 6.

[31] See, *e.g.*, The APME Red Book 1954, p. 190, and Wiggins, *A Failing Faith in the People as a Cause of Official Secrecy*, Bulletin of the ASNE, Oct. 1, 1954, p. 9.

[32] "In sum, secrecy may be a device to conceal ignorance and error as well as knowledge and success." Gellhorn, Security, Loyalty and Science 50 (1950).

[33] Raymond, The People's Right to Know 45 (1955).

[34] *Id.* at 3. This ACLU report concludes that the "abuses of power in Federal agencies to suppress information of value and interest to the nation were never so rampant as now," *Id.*, at 45. For another general report on the subject see Stone, *Secrecy in Government*, 24 Editorial Research Reports 895–912 (1955).

[35] See *e.g.*, Report of Sigma Delta Chi committee, The Quill, Dec. 1954, pp. 7, 8.

[36] Hafner, California and "The Right to Know" (unpublished master's thesis in University of California Library, Berkeley, 1955). See also Berkeley Gazette, Nov. 27, 1951, p. 3.

[37] For examples of these protests see files of The California Publisher, monthly publication of the California Newspaper Publishers Association.

information were passed, both actively supported by the CNPA and the League of California Cities. The first was Assembly Bill 339 which was signed into law as Government Code sections 54950–958 and makes "open public meeting" provisions for all local governmental agencies.[38] The act does not apply to state agencies but, on the basis of a recent opinion of the Attorney General, now appears to apply to legislative bodies of chartered cities.[39] City attorneys of charter cities had previously held both ways on the subject.[40]

Governor Warren objected to the bill's failure to cover state agencies, commenting.[41]

"There isn't any reason at all why we should have a law for local government and then refuse to have the same thing for State government. I personally believe it would be a good thing to have such a law for all branches of government, including the legislature. Some of the worst things that have happened in government stemmed from secrecy. It should be avoided."

The second proposal was Assembly Bill 1160, introduced by Frank Luckel of San Diego as a result of refusal by county health authorities to allow the San Diego *Union* and *Evening Tribune* access to their records. The bill proposed to add a section to the Government Code, reflecting the "intent" of the legislature,[42] and supporters of the bill urged passage because "appellate courts are known to pay close attention to 'intent' whenever a law is challenged." [43] The bill received a pocket veto by Governor Warren, who referred to it as a "cutie" and as merely a statement of policy that did not change existing law. The governor said he vetoed the bill because it was a "pious evasion of responsibility on the part of the Legislature . . . . I believe there is a greater likelihood the Legislature will pass effective legislation if nothing is on the books than if there are a few pious phrases that are not implemented by positive law." [44]

On June 2, 1953, Senator George Miller introduced a resolution to create a special Senate investigating committee on Governmental Organizations.[45] He later announced the group would conduct a study of the availability to the public of official records. Newspaper reporters, editors, and publishers were asked to help the Senate committee by reporting specific instances of refusals or difficulties experienced in attempting to gain access to official records of state, county, or city governments.[46]

---

[38] Assembly Bill 339 was introduced by Ralph M. Brown, chairman of the Assembly Interim Committee on Judiciary. The bill resulted from a ten-part series on "Your Secret Government" by Michael Harris that appeared daily in the San Francisco Chronicle from May 25 to June 4, 1952. For a report of hearings on Assembly Bill 339 in September 1952, see Progress Report to the Legislature by Assembly Interim Committee on Judiciary. Part I, *The Suppression of Public Information by Government Agencies, Commissions, Boards, Councils and Officials*, Part I at 13–63 (1953). For an account of the origins of Assembly Bill 339 and its passage through the legislature see Hafner, California and "The Right to Know" (unpublished master's thesis in University of California Library, Berkeley, 1955).

[39] 27 Ops. Cal. Att'y Gen. 123 (No. 56/40, Mimeographed, March 2, 1956), holding invalid a San Diego city council resolution restricting attendance at "council conferences" by requiring citizens to register and further to agree to remain silent unless requested so to speak. "The right and ability of the people to have free and open access to all meetings of local legislative bodies is vital to the preservation of an informed electorate and constitutes an elemental safeguard to democratic government. The existence of devices, loopholes or subterfuges which tend to 'cabin, crib or confine' the public from free access to the meetings and deliberations of their local governmental agencies is contrary to the public policy of this State." *Id.* at 131.

[40] See the correspondence in the office of League of California Cities, Berkeley.

[41] San Francisco Chronicle, July 26, 1953, p. 14. A bill that would have applied similar "open meeting" requirements to all state agencies was introduced in the 1955 legislature by Sheridan N. Hegland. The bill, Assembly Bill 18, was never reported out of the Committee on Governmental Efficiency and Economy.

[42] Assembly Bill 1160 would have added the following sections to the Government Code: "Except as otherwise provided by law, all official records, reports, or other official documents, or any state agency, or any county, city and county, city or of any district, or any public agency of any kind, or of any of the officers and employees thereof, shall be available to the public for inspection during business hours, and any persons shall be permitted to inspect such official records, reports, or other official documents."

[43] The California Publisher, Aug. 1953, p. 3.

[44] San Francisco Chronicle, July 26, 1953, p. 14.

[45] Sen. Res. No. 157 in 3 Journal of the Senate 3484 (1953 reg. sess.), authorizing and directing the committee "to ascertain, study and analyze all facts relating to any department or agency of state or local government in California, including (but not limited to) its organization, functions and personnel and administration; the evaluation of all phases of its program and the relations of such agencies or departments to newspapers, radio and television in carrying out such program . . . ."

[46] The California Publisher, Dec. 1953, p. 12.

In January, 1954, the committee posed four questions to some 66 state agencies and boards: [47]

"1. What records in the keeping of your office are by law confidential? Please furnish citations for such decisions.

"2. What other records in your office do you consider as not being open to inspection?

"3. What records in your office are not now confidential which you believe should be made confidential? State reasons.

"4. Are any records now confidential by law which you believe should be open to the public?"

The responses, along with opinions of the attorney general and the legislative counsel on the subject, were published by the committee in May, 1965. The 148-page report contains the full replies received from each agency, together with such exhibits as were presented.[48] The committee held hearings in November 1955, and Senator Miller has said other hearings would be conducted during 1956, with the expectation that legislation would be recommended to the 1957 session.[49]

Several sections of the codes of California relate to public records and their inspection. Two sections define public writings.[50] Others provide that citizens are entitled to inspection and, upon demand, to certified copies of public writings.[51] These definitions of "public writings" extend well beyond the general common law definitions.[52] The "stark brevity" of the California definitions has left wide scope for judicial interpretations,[53] but actually there have been few cases bearing on these statutes. For the most part those that have been decided have ruled merely whether a particular record falls within the provisions of the statutes and do not lay down any broad general rules that can be followed. Generally there is no single test that may be applied to determine what constitutes a public record.[54] The only language of general applicability in the various California cases is found in *Coldwell v. Board of Public Works* [55] to the effect that "the only means of deciding whether or not a document is a public writing is by determining whether or not it falls within the statutory definition." [55a]

On the suface California's statutes defining public records and the right of inspection appear to be "liberal." The general statutory provisions seem clearly

---

[47] Calif. Senate Special Committee on Governmental Administration, *Public Records Survey* (Partial Report, May 1955). This report will hereinafter be cited as *Public Records Survey*.

[48] *Ibid.*

[49] Letter from Senator George Miller, to writer, September 30, 1955: "It is our hope . . . we will be able to develop some better law on the subject to remove the areas of doubt which now exist."

[50] "Public writings" are defined in Cal. Code Civ. Proc. § 1888 as follows: "Public writings are: 1. The written acts or records of the acts of the sovereign authority, of official bodies and tribunals, and of public officers, legislative, judicial, and executive, whether of this State, of the United States, of a sister State, or of a foreign country; 2. Public records, kept in this State, of private writings."

Cal. Code Civ. Proc. § 1894 provides: "Public writings are divided into four classes: 1. Laws; 2. Judicial records; 3. Other official documents; 4. Public records, kept in this State, of private writings."

[51] Cal. Govt. Code § 1227 provides: "The public records and other matters in the office of any officer, except as otherwise provided, are at all times during office hours open to inspection of any citizen of the State."

And Cal. Code Civ. Proc. § 1892 provides: "Every citizen has a right to inspect and take a copy of any public writing of this State, except as otherwise expressly provided by statute."

Cal. Code Civ. Proc. § 1893 states: "Every public officer having the custody of a public writing, which a citizen has a right to inspect, is bound to give him, on demand, a certified copy of it, on payment of the legal fees therefor, and such copy is admissible as evidence in like cases and with like effect as the original writing."

[52] The following is a frequently cited common law definition: "A public record is a written memorial made by a public officer. . . . [It] is one required by law to be kept, or necessary to be kept in the discharge of a duty imposed by law, or directed by law to serve as a memorial and evidence of something written, said or done." Amos v. Gunn, 84 Fla. 285, 343, 94 So. 615, 634 (1922).

[53] Cross, in Bulletin of the ASNE, June 1, 1954, p. 7.

[54] The mere fact that a writing is in the custody of a public agency does not make it a public record. Whelan v. Superior Court, 114 Cal. 548, 46 Pac. 468 (1896); Coldwell v. Board of Public Works, 187 Cal. 510, 202 Pac. 879 (1921). A test frequently used by the courts is that "in order that an entry or record of the official acts of a public officer shall be a public record it is not necessary that such record be expressly required by law to be kept, but it is sufficient if it be necessary or convenient to the discharge of his official duty." People v. Tomalty, 14 Cal. App. 224, 231, 111 Pac. 513, 515 (1910). See also People v. Pearson, 111 Cal. App. 2d 9, 244 P. 2d 35 (1952).

[55] 187 Cal. 510, 202 Pac. 879 (1921).

[55a] *Id.* at 518, 202 Pac. at 882.

to indicate the legislature intended that only those matters specifically made confidential by law should be excepted from public view.[56] In passing Assembly Bill 339 in 1953 the legislature declared the following as a matter of policy:[57]

"The people of this State do not yield their sovereignty to the agencies which serve them. The people, in their delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created."

And in Assembly Bill 1160, the legislature declared as its "intent" that "all official records, reports, or other official documents" should be available to the public for inspection, "except as otherwise provided by law."[58]

The phrase "and other matters" in Political Code section 1227[59] would seem to imply that the legislature intended to extend the right of inspection to more than just "public records." And the courts have been "liberal" in their interpretation of the phrase "other matters." In *Musket* v. *Department of Public Service*,[60] it was held that the papers of a municipal utility were not "strictly speaking public records," but access was granted on the ground they were "other matters" of a general public concern. In *Coldwell* v. *Board of Public Works*[61] the court held that a private person had the right to inspect the preliminary estimates and plans prepared in the office of the city engineer of the City and County of San Francisco, in connection with the Hetch-Hetchy project, even though the documents were memoranda prepared for use in the office and had not been formally adopted as the official acts of the engineer. Inspection was granted on the basis they were "other matters" in which the "whole public" had an interest. In both cases the petitioner gained access to documents sought, and both reflect a liberal point of view in respect to the public's right of inspection.[62]

In reaching its conclusion in *Mushet* v. *Department of Public Service* that the documents "strictly speaking" were not public writings, the court adopted a policy of consolidating the statutes, resulting in a restrictive definition of "public writings." According to section 1888 of the Code of Civil Procedure public writings are the "written acts or records of the acts" of public bodies or officials. Section 1894 then divides public writings into four classes: "law, judicial records, other official documents, and public records, kept in this state, of private writings." Consolidating the language of the two statutes, the court held in the *Mushet* case that papers in question must not only be "official documents" but must also be the "written acts or records of the acts" of public officials or bodies.[63] In other words, it is not enough that they be written acts or records of acts *or* official documents—they must be ***both***.

This "doctrine of exclusion" has been consistently applied by the attorney general in opinions rendered for various state agencies.[64] And the Miller committee survey shows these opinions have been widely relied on by many agencies other than those for whom they were prepared. It is not difficult to see how this

---

[56] Consider, *e.g.*, instructions by the governor in a letter by his departmental secretary to all department heads: "[T]he Governor [has] instructed me to notify the Department of Public Health that any report it prepares should be made available to the press unless there is a specific prohibition in law against it. This may be taken as policy by all departments." Letter from M. F. Small, Departmental Secretary to All Department Heads, Jan. 7, 1952, in *Public Records Survey, supra* note 47 at 140. The Controller replied to the Miller committee inquiry: "Unless made confidential by law, we regard all records in the custody of this office as being open to public inspection" *Id.* at 77.

[57] Cal. Govt. Code § 1227.

[58] This was the bill which received a pocket veto by Governor Warren. See note 42 *supra*.

[59] Section 1227 provides: "The public records *and other matters* in the office of any officer, except as otherwise provided, are at all times during office hours open to inspection of any citizen of this state." (Emphasis added.)

[60] 35 Cal. App. 630, 170 Pac. 653 (1917).

[61] 187 Cal. 510, 202 Pac. 879 (1921).

[62] A student writer hailed the *Coldwell* case thus: "This case establishes the sound rule that a citizen or organization of citizens may inspect all data concerning any activity of the state or municipality irrespective of their character as public records . . . . The section of the Code of Civil Procedure [section 1892] which opens all public writings to inspection has been made mere surplusage by this decision. Everything covered by it and much additional material is accessible under the Political Code . . . ." Note, 10 Calif. L. Rev. 346, 347–48 (1922).

[63] 35 Cal. App. 630, 170 Pac. 653 (1917).

[64] The "doctrine of exclusion" as expressed in the *Mushet* case "has been consistently followed by the courts and this office in its determination of what are and what are not public or private writings." 18 Ops. Cal. Att'y Gen. 231, 235 (1950). See also Ops. Cal. Att'y. Gen. 41 (1948), 13 Ops. Cal. Att'y. Gen. 180 (1949), 16 Ops. Cal. Att'y Gen. 163 (1950).

"doctrine" could have been conceived. Section 1894 certainly has little meaning standing by itself. However, one could question whether the office of the attorney general was *required* to construe the public records statutes in the restricted manner in which it has. But conceding the attorney general felt constrained by the dicta of the *Mushet* and *Coldwell* cases to follow the *Mushet* "doctrine of exclusion" there appears to have been no *requirement* for the attorney general to have interpreted "records of the acts" so narrowly.

This is illustrated in an opinion prepared in response to an inquiry from the County Council of San Bernardino raising the question of whether lists of names and addresses of students attending a public high school were "public writings" within the meaning of the statutes. The question concerned lists of pupils maintained by school officials in preparation of reports required under the Education Code and also to serve as aids in school administration. The attorney general applying the "doctrine of exclusion" of the *Mushet* case, concluded the "records in question are not public records . . ." [65] It is significant to note that the attorney general refers to the lists as "records." The preparation of such lists—for whatever purpose—certainly is an *act*. The attorney general still could have applied the *Mushet* analysis and found such records to be "official documents" that were also "records of acts" and hence to be "public writings."

Also it is to be noted that subdivision 3 of section 1894 of the Code of Civil Procedure refers to "other official *documents*," which could be interpreted to imply that the legislature intended public writings to include more than "written acts or records of acts." Otherwise, why not "other official *records*," thus making it consistent with subdivision 2—"judicial records"?

The right of inspection is not an absolute or unqualified right, and even though a document is a public record it is not automatically open to inspection. Section 1892 of the Code of Civil Procedure provides every citizen has a right to inspect any public writing "except as otherwise expressly provided by statute," and section 1227 of the Goverment Code permits inspection of public records and other matters "except as otherwise provided." For reasons of public policy, the legislature in many instances has specifically declared certain records to be confidential or not open to inspection. Also there are particular relationships which the legislature has declared should be protected and preserved inviolate. Section 1881(5) of the Code of Civil Procedure provides: "A public officer cannot be examined as to communications made to him in official confidence, when the public interest would suffer by the disclosure."

On several occasions the courts have recognized section 1881(5) as an exception to the public records statutes.[66] Also it has been held that public policy demands certain types of communications and documents be treated as confidential even though they are in the custody of a public officer and are of a public nature.[67] In the exercise of their investigative powers, government agencies frequently find it necessary or convenient to solicit data that would be available only with the understanding it will be kept confidential and not indiscriminately disclosed. Undoubtedly there are situations in which it is in the public interest that a public official and the integrity of his information be protected. The statute would clearly seem to place the burden on the custodian of the records to demonstrate that "the public interest would suffer by the disclosure," to use the words of section 1881(5).

It appears there should be some sort of control over the public official in the exercise of this privilege, but this presents a difficult problem. As Hocking has commented, "We say recklessly that [readers or listeners] have a 'right to know': yet it is a right which they are helpless to claim, for they do not know that they have a right to know what as yet they do not know." [68]

The Miller committee survey shows that public officials in many instances have assumed a good deal of authority to withhold information and that confusion and inconsistencies exist among the various agencies. Several of them

---

[65] 16 Ops. Cal. Att'y. Gen. 163, 164 (1950). Cross has warned newspaper editors to avoid "routine, indiscriminate requests" for opinions of attorneys general. "These men by their official position are advocates of those very office holders whom you are seeking to force to permit that access." The Publisher's Auxiliary, Feb. 16, 1954, p. 1. See also Editor & Publisher, April 25, 1953, p. 106. "Opinions of the attorney general are not of controlling authority, but in the light of the relation of the office to the general government, they are regarded as having a quasijudicial character and are accorded substantial weight by the courts." 6 Cal. Jur. 2d 97 (1952).

[66] *San Francisco* v. *Superior Court*, 38 Cal.2d 156, 238 P.2d 581 (1951); *Coldwell* v. *Board of Public Works*, 187 Cal. 510, 202 Pac. 879 (1921).

[67] *Runyon* v. *Board of Prison Terms and Paroles*, 26 Cal. App.2d 183, 79 P.2d 101 (1938).

[68] Hocking, Freedom of the Press 170–71 (1947).

comment on the uncertainty of the law and declare that legislation to clarify the situation would be helpful.[69] Some agencies regard the information submitted in application for a license and the grades made in an examination to be confidential.[70] Others do not.[71] The Structural Pest Control Board takes the interesting position that since sections of the Structural Pest Control Act list certain documents as public records, "it would, therefore, follow, that those not named would be confidential" [72] The Miller committee survey further noted:[73]

"While the newspapermen, because they are expected by the public to report on public affairs, encounter many difficulties in carrying out this mission, theirs is not nearly so difficult as is the lot of the individual taxpayer. . . . For newspapermen, wise in the ways of obtaining facts, usually manage to ferret out the information they seek despite the obstacles encountered."

But the public's right to information about public affairs should not be based on such a haphazard, illogical process. It should *not* be left to official grace, indulgence or discretion. Public policy calls for some speedy objective process by which denials of access may be tested by legal standards clearer and more uniform than now exist. The right should be subject only to those limitations that are clearly and urgently in the public interest.[74] The determination of just where this public interest lies is, in practice, a difficult problem. Newspaper editors themselves are not in agreement.[75]

The argument is made that the public interest is best served "if ideas can be fully and freely exchanged." [76] Obviously it is not in the public interest that every piece of correspondence of every public official be open to indiscriminate inspection. But in a democratic society that public should be entitled to know the considerations involved in public affairs decisions, as well as the results.[77]

Naturally, no reasonable person wants access to information that legitimately should be concealed in the interest of national security and defense, and would not claim right of inspection of records pertaining to state secrets, diplomatic communications, confidential military matters, and the like. Also, it is recognized there are cases in which public policy demands that certain proceedings and papers be kept from public view—ranging, for example, from some personnel records to deliberations of the Supreme Court. Should the public be told *all* (the position of the overzealous "right to know" advocates), or what some person in authority thinks is wise or sufficient for them to know (the position of officials who claim an *inherent* power to suppress)? The answer, of course, is some place in between. Such decisions should be by legislative determination and not left loosely to the custodian of the records.

Absolutes are neither desirable nor attainable, and, as Cross points out, no perfect law is to be expected.[78] The situation in California is considerably better than that found on the federal level and in many states. But still, on the basis of existing cases and opinions of the attorney general, one is unable to determine with any degree of certainty what are public records and what are not. In any "tight" cases that might now arise, California statutes as presently interpreted do not appear to give adequate recognition to the importance of the market-place

---

[69] *E.g.*, The Department of Public Works states: "Passage of legislation to remove this uncertainty [as to the confidentiality of matters involved in prospective or pending litigation] would be highly desirable." *Public Record Survey, supra* note 47 at 136.

[70] *E.g.*, Board of Optometry, *id.* at 127, and Board of Architectural Examiners, *id.* at 117.

[71] *E.g.*, Board of Medical Examiners, *id.* at 125.

[72] *Id.* at 128. The Board of Chiropractic Examiners takes a similar view, *id.* at 118.

[73] *Public Records Survey, supra* note 47 at 7. "Newspapers generally, though with numerous exceptions, enjoy more and better access to these sources of news by means of the sugar of voluntary processes than they could hope to get by the vinegar of compulsion under the present state of the law." Cross, The People's Right To Know 5 (1953).

[74] "It is not enough merely to recognize the important political justification for freedom of information. Citizens of a self-governing society must possess the legal right to examine and investigate the conduct of its affairs, subject only to those limitations imposed by the cost urgent public necessity. This right must be elevated to a position of highest sanctity if it is to constitute an effective bulwark against unresponsive leadership." Note, *Access to Official Information: a Neglected Constitutional Right*, 27 IND. L.J. 209, 212 (1952).

[75] See differing points of view expressed by Mathews, Newton and Wiggins, "How Best to Fight Official Secrecy," Bulletin of the ASNE, Nov. 1, 1954, p. 3.

[76] Peterson, *The Legislatures and the Press*, 27 State Government 223 (Nov. 1954). "Too often the members of the press assume that public servants, as a group, are not entitled to confidence with respect to their conscientious endeavor to discharge their duties honorably." *Id.* at 224.

[77] *But cf.*, "Only documents which present ultimate actions should be accessible to the public. Those which are merely part of the preliminary steps by which the conclusion was reached should become public only in the discretion of the particular agency." Yankwich, Book Review, 48 Nw. U.L. Rev. 527, 530 (1953).

[78] Cross, in Bulletin of the ASNE, March 1, 1955, pp. 9, 10.

of public opinion in a free society. As Macaulay said, ". . . nothing could be more irrational than to give power and not give the knowledge without which there is the greatest risk that power will be abused." [79]

The degree of confusion and inconsistency evidenced by agency responses to the Miller committee alone indicates clearly the need for legislative action. There is obvious need for a new and more positive law. One approach might be to declare *everything*, in effect, to be a public writing and open to inspection, unless expressly excepted by statute.[80] This would require a careful study to determine just what specific documents the legislature desired to declare by law to be confidential. In instances in which the legislature in the past has desired that government documents be withheld from public inspection because of the nature of the records, the legislature has known how to legislate to that end; in fact, it has done on at least twenty-four occasions.[81]

It is true such procedure may result in oversights and omissions, producing occasional "hard" cases for the courts. But that is the lesser evil than a continued tendency to narrow the information available to the citizen concerning the operation of his government.

Mr. CHILES. Mr. President, the Florida Sunshine Act had a tortuous history. It was introduced in every regular session of the Florida Legislature from 1961 until its passage 6 years later. Five other States—Arkansas, Indiana, Nebraska, New Jersey, New Mexico—enacted open-meeting measures while the Florida law was being debated. State legislators and the Florida media shared a concern over increasing closed meetings and behind-the-scenes government combined to alert Floridians to the dangers of secret government. In writing of the Florida law, one commentator said about the origins of this new public concern:

The increased demands for open government in the United States since World War II seem to have had no specific origin, but an aversion to undue centralization and irresponsible government revealed itself in such political issues as reapportionment and home rule. The emergence of an affluent and better educated society whose attention focused on sophisticated issues strengthened the demands for political responsibility. The increased impact of mass media on society played an important role in directing public attention to inadequacies and abuses of government. Whatever its source, the public's urge to participate more fully in legislative decisions was evident.

The forces necessary for the passage of a sunshine law in Florida finally came together in 1967. The law is brief and simple, saying that all meetings of governmental bodies are open to the public at all times. No resolutions or actions of such bodies are binding unless they are made at such an open meeting. Minutes of such meetings are to be recorded and open to public inspection, and violators of the act are charged with a misdemeanor and specified penalties.

Experience under the sunshine law has shown that the open meeting principle does not hamper public business operations and increases public confidence in government. I functioned under Florida's law for 3 years in the Senate and became totally convinced that the lawmaking process was not inhibited or damaged. Closed doors are not necessary to sound resolution of conflicting views and interests.

---

[79] 4 MACAULEY, HISTORY OF ENGLAND 429 (Harper ed. 1879).

[80] The present statutory definition of "public writings" *could* be interpreted to do this. Public writings are "written acts or records of the acts" of official bodies or public officers (Cal. Code Civ. Proc. § 1888). Is not a letter a "written act or record of the act"—the *act* of communicating? See La. Rev. Stat. § 44:1 (1950) for a broad, general definition of public records.

[81] See Opinion of Legislative Counsel No. 110, July 21, 1953, in *Public Records Survey, supra* note 47 at 17, for list of twenty-four statutes declaring documents confidential. "In general the statutes declaring certain documents confidential are indexed only by the subject matter. Consequently, a complete list of such statutes cannot be prepared without a careful examination of all the laws of the State." *Ibid.* A survey of New Jersey statutes discloses sixty-seven known statutes that classify certain documents as "public records" and/or "records open to public inspection." Young, Public Records in New Jersey (Rutgers University Press Research Survey Study No. 9, 1955).

A steady criticism of the sunshine law was that requiring open meetings would only generate secret preconference agreements which would be formally ratified at the public meeting. True, this was tried by some Florida officials, but the Florida courts have since made clear in a number of decisions that the sunshine law's open-door rule applied to all meetings dealing with the public's business. For instance, the Supreme Court of Florida, in *Board of Public Instruction* against *Doran* 1969, ruled that the "entire decision making process" of government is subject to the act, not just "formal meetings" or voting sessions. For further information, I offer an annotated report on the law by Robert E. Greenberg, research assistant to Prof. L. Harold Levinson of the University of Florida College of Law and ask unanimous consent that the report be printed in the Record.

There being no objection, the report was ordered to be printed in the Record as follows:

AN ANNOTATED HISTORY OF FLORIDA'S "SUNSHINE LAW"

(By Robert E. Greenberg)

THE BEGINNING

On April 12, 1961, Senator Cliff Herrell of Miami introduced a bill to ban secret meetings by governmental agencies.[1] It heralded Florida's first attempt to replace "molehill government" with "government in the sunshine."

Herrell's bill carried no penalties for officials who conducted public business in private.[2] The proposed law provided that "no administrative body of the state, a county, district or city shall hold meetings which are closed to the public."[3] The prohibition applied to informal gatherings, as well as formal, if official business was the subject of the meeting. Meetings concerned with confidential investigations, merit examinations, unsubstantiated charges against personnel, land acquisitions where premature disclosure would increase prices and state secrets would be exempt.[4]

A similar proposal by Senator J. Emory Cross[5] of Gainesville included a penalty for violation of the open meeting requirement.[6] This same bill, when introduced in 1967, eventually became § 286.011, Florida Statutes, or the Government-in-the-Sunshine Law.[7] After its introduction in 1961, the issue died in committee. The same fate awaited it for five more years. One newspaper characterized the vote as ". . . wise cracking, laughing . . ." at Floridians, denying the people public meetings.[8]

State Attorney General Richard W. Ervin favored and appeared on behalf of the proposed legislation. It was his hope to create some sort of "honor system" to provide a rule of conduct which the cabinet, county commissions, and state agencies could follow.[9] "I believe this bill would create more confidence in government."[10] Though private meetings are "more expeditious," Ervin felt that secrecy caused more errors in judgment than public meetings.[11] Where you know what you say and do is going to be put down," public officials are inclined to be more cautious.[12]

The success of the embryonic Sunshine Law may well have been caused by the federal court decision requiring new elections in accord with one man, one vote

---

[1] Fla. S. Jour. 103 (April 1961).
[2] Tampa Tribune, April 12, 1961.
[3] *Id.*
[4] *Id.*
[5] Fla. S. Jour. 125 (April 1961).
[6] Tampa Tribune, April 13, 1961.
[7] *Id.* In § 1 the only addition being: ". . . at which official acts are to be taken. . . ." In § 2 the original appeared as the first sentence only. § 3 containing the penal provisions was amended by Ch. 71–136. Laws of Florida (1971).
[8] Tampa Tribune, May 4, 1961. One Senator was quoted: "My people don't want it. They like secret meetings." Another was heard to say that the death vote was representative of good government.
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.*

reapportionment, to balance the urban-rural percentage that had for so many years been tipped against the more liberal cities. One could say that when the "porchoppers" lost control of the Legislature, Sunshine's passage was inevitable.

Fortuitiously, the Senate chamber was then engaged in a debate over "executive sessions" and their abuses. The media had been aroused when one of their number refused to leave one of these sessions and was forcibly ejected.[13]

GOVERNMENT-IN-THE SUNSHINE: APPENDIX A

On April 13, 1967, S.B. 9, later to become § 286.011, Florida Statutes, was placed on the Senate calendar, the first time in history such a measure survived committee politics.[14] "The public's business should be conducted in public; . . this won't completely stop secret huddles but it will require that discretion be used." [15]

Two days later the bill was passed by the Senate and sent to the House [16] where three amendments were offered. The Senate agreed to one amendment vesting the Circuit Courts of the state with injunctive powers to prevent future violations, and rejected two others exempting personnel and other secret matters from the purview of the law.[17]

Perhaps the best account of the drama on the floor appeared in a Tampa newspaper article: [18]

"The Government in the Sunshine bill whipped back and forth between the two houses of the legislature yesterday like a woman scorned."

The Tampa Tribune reported on June 28, 1967 that Nebraska had that day passed an "open meeting" bill similar to the Florida proposal. "It requires any governing body using public money or recommending such spending to hold meetings open to the public." The media would not forget.

When the government in the sunshine bill finally emerged from a joint House-Senate Committee, it was intact, with the addition of the injunctive remedies now available.[19]

THE FIRST DECISION: APPENDIX B

In 1969, the Dade County Circuit Court issued what amounts to the first reported opinion interpreting the government in the sunshine law, in *Berns v. City of Miami Beach.*[20]

The newspaper publisher, editor, and a reporter of the Miami Beach Sun,[21] filed suit charging the defendant city and its councilmen with holding secret meetings in violation of the government in the sunshine law.[22] The relief prayed for was an injunction prohibiting the council from holding any more meetings at which official acts were to be taken where the public was excluded.

The complaint alleged that defendants caused the reporter to be arrested and charged with disorderly conduct for refusal to leave the city manager's office; that the reporter's conduct was at all times peaceful and orderly; and that his refusal to leave the office was based solely on the belief that the defendants were contemplating holding a secret meeting; and that he was under instructions from his superiors at the newspaper to cover all of the defendants' meetings, secret or otherwise.[23]

The defendants countered by admitting that they had "gotten together" in private, usually in the city manager's office, and usually an hour or so before the regular city council meetings.[24] The defendant described these pre-meeting meet-

---

[13] St. Petersburg Times, April 6, 1967, see *also* Tampa Tribune, April 11, 1967.

[14] Fla. S. Jour. 23 (April 1967).

[15] Florida Times-Union, April 14, 1967. The bill received unanimous approval in the Judiciary Committee.

[16] Fla. S. Jour. 93 (April 1967).

[17] Fla. S. Jour. 679 (June 1967).

[18] Tampa Tribune, June 9, 1967.

[19] *Id.* on June 28, 1967.

[20] 32 Fla. Supp. 7 (#68–17875 Circuit Court, Dade County. March 25, 1969) *aff'd,* 231 So. 2d 847 (3d D.C.A. Fla. 1970) *aff'd* 245 So. 2d 845 (Fla. 1971).

[21] Now called The Miami Beach Sun-Reporter. Robert Swift, the editor at the time, is no longer associated with the paper. There are no current employees who were with the paper when the suit was filed. The paper was owned by Louis Wolfson at the time. We expect to receive the briefs used in argument before the Supreme Court of Florida shortly.

[22] § 286.011 Fla. Stats. (1971).

[23] Fla. Supp. 7 at 8. The Court had earlier denied defendant's motion to dismiss on the grounds that § 286.011 did not apply to municipalities. *See,* Op. Atty. Gen. 071–171 (1971) and § 1.01 Fla. Stats. (1971).

[24] *Id.* at 9. Attorney General Shevin will later condemn this very practice as one the law was designed to thwart. Op. Atty. Gen. 071–32 (1971).

ings as "briefing sessions," "conferences," or "backgrounders." [25] The public and press were neither aware of the times of these sessions nor permitted to be present.[26]

Judge King, in granting a permanent injunction, held that there is no such right to hold such meetings under the Sunshine Statute. "The legislature did not exclude, by subject, certain matters which could be discussed in private. It is the prerogative of the legislature to specify those matters which must be considered as public meetings and if they so elect, specify those matters which may be considered privately." [27]

Notwithstanding the court's finding that voting did in fact take place behind closed doors, the judge felt that, ". . . the purpose of this opening meeting statute would be frustrated if the entire deliberative process could be held behind closed doors only to emerge in public for a show of hands." [28]

With all the clamor that has preceded and followed the enactment of the Sunshine Law, concerning what is covered and what is not, Judge King had no trouble in reading the statute to effect Senator Cross' intent:

"The Florida Legislature has mandated that the public has the right to know without exception, when, how, and why its business is being conducted. Deliberations, sessions, conferences, briefings, expressions, discussions, proposals, recommendations, actions, reports, etc. must be open to the public, *for these are as much official acts as the final vote itself*. The legislative intent is clear. The collective acquisition and exchange of facts by the defendants is required to be made in public. The reasons for and against a choice of a course of action are 'official acts.' Obviously, the vote cannot be had without the prior receipt and exchange of ideas and information." [29] (emphasis added).

In the court's findings the trial judge mentioned, *inter alia*, that the plaintiffs had standing to sue.[30] At this point one must speculate whether the pending criminal charge entered into the judge's decision. Further, it is not made clear whether the Sunshine Law will be deemed a valid defense in the instant case; rather, the judge enjoined the defendants from continuing the prosecution of the plaintiff reporter.

Various other newspapers [31] reported Sunshine violations: In Alachua County the members of the school board met at the home of the acting chairman during the 1968 teacher crisis—the meeting held at night was termed a coffee get-together instead of a meeting. The city commissioners of Stuart, Florida were indicted and suspended by Governor Kirk for holding secret meetings for which they kept no minutes, while they parceled out bonuses to two city employees. In Alachua County in 1969 the State Attorney and the State Auditor refused to divulge any information concerning the fiscal affairs of the Court of Record, then under investigation.

Commenting on the secret investigation of the Court of Record, the Gainesville Sun editorialized: [32] "Our purpose for reading such facts into the record is a simple one. We think government-in-secrecy is a mistake which undermines public confidence. And we don't think such mistakes should be repeated."

TIMES PUBLISHING—FIRST APPELLATE REVIEW: APPENDIX C

Times Publishing Company v. *Williams*,[33] represents the first considered opinion of a Florida Appellate Court construing the government in the sunshine law.

The appellants, Times Publishing Company,[34] filed a complaint in the Pinellas County Court alleging that the county school board had held various secret meetings during 1967 and 1968, subsequent to the enactment of the Sunshine Law. At the conclusion of the testimony, the trial judge denied plaintiffs' prayer for an injunction to preclude such future activity.

---

[25] *Id.*

[26] *Id.* The defendants contended that primarily: a) land acquisitions or condemnations; b) personnel matters; and c) pending litigation were discussed at these sessions. Note the similarity to the Herrell bill, *see*, note 4, *supra*.

[27] *Id.*

[28] *Id.* Note the similar train of thought in 071–32, *supra*, note 24.

[29] *Id.*

[30] *Id.* at 10.

[31] *E.g.*, Gainesville Sun, editorial, January 26, 1969.

[32] *Id.*

[33] 222 So. 2d. 470 (2d D.C.A. Fla. 1969).

[34] Publishers of the St. Petersburg Times were Betty Orsini and Charles Patrick.

On appeal, the appellants contended that "injunctive relief is available to the members of the public to enjoin and prohibit the Board of Public Instruction of Pinellas County, Florida, from holding meetings at which official acts are to be taken if the public is to be excluded." [35] Appellants also urged that whenever the board met "informally" or for any purposes relating to the operation of the schools and excluded the public, the board was violating the statute and should likewise be enjoined from holding such secret meetings.

The court found, as a matter of law, that since the act relates to ". . . all meetings . . . at which official acts are to be taken. . .", it is obvious the legislature intended to extend application of the "open meeting" concept so as to bind every board or commission of the state, or of any county or political subdivision over which it has dominion or control.[36]

The Court felt that the Government in the Sunshine Law was a "declaration of public policy, the frustration of which constituted" irreparable injury to the public interest.[37] To effectuate this policy, it was the entire *decisionmaking process* that the legislature intended to affect by the enactment of the statute. "Every thought, as well as every affirmative act, of a public official as it relates to and is within the scope of his official duties, is a matter of public concern." [38] Every step in the process culminating in a decision, is an indispensable requisite to "formal action"; it therefore follows that each such step constitutes an "official act," an indispensable requisite to "formal action," within the meaning of the act.[39]

In interpreting the intent of the legislature, the Court came to the conclusion that "official acts" cannot be limited to "formal action." The formal act of voting on an issue, or the formal execution of an official document, easily ascertainable from the record, encompassed only a fraction of the real need for the act's creation. "It is how and why the officials *decided* to so act which interests the public." [40] ". . . the legislature could only have meant to include therein the *acts* of *deliberation, discussion*, and *deciding* occurring prior and leading up to the affimative "formal action" which renders official the final decisions of the governing bodies." [41]

The Court then went on to deal with the questiton of exceptions to the open meeting mandate of the act; specifically, where personnel matters were involved.

As a matter of law the court held that, "any rights or privileges (here personnel matters) . . . third parties might have must be found elsewhere," and the agencies, etc. governed by the sunshine law could not rely on the rights and privileges of these third parties to disregard and circumvent the provisions of the act.[42]

In keeping with the notion that personnel matters were not legally protected, the Court left open the door for future "real" privileges. "The attorney-client relationship is a unique one under the law. Within this relationship both the attorney and the client enjoy rights and privileges independent of each other.[43] Clearly, the area of the attorney-client relationship which is excepted from the statute is that which would conflict with the ethical obligations of the profession. "It is our conclusion, therefore, that the legislature is fully aware of its constitutional limitations and did not intend . . . to place attorneys in a position of having no alternative but to violate the Canons of Ethics." [44] All other consultations between the public agency and its counsel are precluded, "since the public has waived any privilege of confidentiality it may have by virtue of such relationship." [45]

---

[35] *Id.* at 472. Compare these contentions with the allegations in the complaint in *Berns, supra. See also,* appellant's brief at 10.

[36] 222 So. 2d at 473. The Court then referred to *Walling* v. *Carlton,* 190 Fla. 97, 147 So. 236 (1933) where "official act" was defined as: "any act done by the officer in his official capacity under color and by virtue of his office."

[37] 222 So. 2d at 473.

[38] *Id. See also,* appellant's brief at 25–6.

[39] *Id.*

[40] *Id.* at 474. *But see, Bassett* v. *Braddock, infra.*

[41] *Id.*

[42] *Id.* The Court stated that the public interest may not be served by closed door personnel hearings. "The public has chosen to deny any privilege or discretion in appellee and similar governmental bodies to conduct closed meetings."

[43] 222 So. 2d at 475. *See Florida Bar* v. *Massfeller,* 170 So. 2d 834 (Fla. 1965).

[44] 222 So. 2d at 476.

[45] *Id.* The Court later receded from this position in *Bassett* v. *Braddock,* 262 So. 2d 425 (Fla. 1972).

In *Board of Public Instruction of Broward County* v. *Doran*[46] the Florida Supreme Court held that the statute was sufficiently precise and afforded adequate standards to afford due process to those charged with violations of the law.

As per the previous cases the plaintiffs alleged violations of law, seeking an injunction to prevent such future activity.

In its answer, the defendant school board admitted that members of the board meet for an informal conference at which no official acts were to be taken or were taken, and at which time the public was excluded; thereafter the board would hold "open," public meetings. The affidavits of the several parties indicated that there were several occasions when the board retired to discuss matters in private, though no formal action was taken.[47]

In determining that the statutory language provided adequate guidelines the court adopted a "foreseeable action" test. "The obvious intent was to cover any gathering of the members where the members deal with some matter on which foreseeable action will be taken by the board." [48]

In short, the statutory language conveyed a definite warning as to proscribed conduct when measured by common understanding or practices.[49] "Statutes enacted for the public benefit should be interpreted most favorably to the public."

"One purpose of the Sunshine Law was to maintain the faith of the public in governmental agencies. Regardless of their good intentions, these specified boards and commisions, through devious ways, should not be allowed to deprive the public of this inalienable right to be present and to be heard at all deliberations wherein decisions affecting the public are being made." [50]

In referring to the law as clarified by the Court, one official described it as "that idiot decision." [51] "If it doesn't make liars out of us, it makes connivers out of us." [52]

In retrospect, compliance at first was slow and officials in some areas seemed convinced the law implicitly contained certain exemptions.

The 1969 decision in *Times Publishing Co.* v. *Williams*, supra,[53] was a significant step in developing an expansive interpretation. Subsequent rulings removed all clouds as to the full impact of the law.[54] A survey by the Associated Press revealed that dramatic changes in the management of government had begun.[55] Among the more striking examples.

(1) The Orange County Commission no longer bodily removes reporters when they are not wanted; [56]

(2) The Broward County School Board (the defendant in the *Doran* case) acquiesced; [57]

(3) The State Cabinet's longstanding practice of breakfast at the Duval Hotel and coffee in the governor's office prior to the regular meeting has collapsed; [58]

(4) The State Board of Regents' frequently-invoked rule of excluding reporters when selection of a University president has come up has been ended; [59]

(5) The Miami Beach City Council, famous for its meetings in the back room of Mendelson's Meat Market, is now conducting business in the open; [60]

---

[46] 224 So. 2d 693 (Fla. 1969), *reh. denied,* July 29, 1969. In the rehearing petition, school board attorney Shanleweiler contended that the court's decision "seems to be broader than the express language of the act itself", and that "it is difficult to conceive why the narrower sunshine law is given the broadest interpretation by the court." *See,* Tampa Tribune, July 30, 1969.

[47] 224 So. 2d at 696. "Items were passed by letter and number and it was impossible for the public to understand the items being considered."

[48] *Id.* at 698.

[49] The Court did imply that the statute does require a charge and proof of scienter even though it is not specified as a specific element of the offense.

[50] *Id.* at 699. The injunction was accordingly affirmed.

[51] Tampa Tribune, August 3, 1969, referring to the *Williams* decision.

[52] *Id.* Paul Pickett, then Orange County Commission Chairman.

[53] *See* note 33.

[54] *But see Bassett* v. *Braddock,* 262 So. 2d 425 (Fla. 1972) abruptly reversing the snowballing trend established in these cases.

[55] Tampa Tribune, August 3, 1969.

[56] *Id.* Chairman Pickett was not happy about the Supreme Court Opinion, when informed by the County Attorney.

[57] *Id.* Whenever we have a quorum present we shall be open to the press and public: Supt. Ralph Staten.

[58] *Id.* "I believe that it should be the policy of the governor and all Cabinet members to take care that at such times as they are together, the press and public should have complete access to the meetings . . ." Letter to Governor Kirk, by Attorney General Earl Faircloth.

[59] *Id.*

[60] *Id.*

(6) The Leon County School Board no longer holds secret sessions while discussing integration, and choice of a consultant; [61]

(7) The Lee County School Board no longer closes its doors in attempting to deal with recurring teacher disputes; [62] and

(8) The St. Petersburg City Council has abandoned its long famous "executive session," partly because of the Supreme Court, partly because the three new members elected had all campaigned against the practice.[63]

The radical changes brought by the Sunshine Law seemed to catch many officials in a state of shock and disbelief.

Two schemes designed to circumvent the effects of the newly vitalized law were quickly instituted: (1) two-party meetings and (2) proliferating memoranda.[64] The two-party meeting operated thus: The head of the board would meet with other members of the board, one at a time, on a touchy subject until some consensus had been arrived at, or at least until all the members of the board had been briefed sufficiently on its background, so that no debate need occur at a formal meeting.[65] Utilization of memos, one after the other between commissioners or board members would eventually "type out" an issue.

Perhaps the greatest challenge to the law came in the form of threatened libel suits for damaging and libeling discharged public employees.[66] One Commission Chairman voiced his intent to seek legislative changes in 1970 to exempt personnel, legal matters, and condemnation proceedings from the law's purview.[67]

THE QUASI-JUDICIAL EXCEPTION: APPENDIX E

On January 27, 1970, the First District Court of Appeal admitted an exception to the Government in the Sunshine Law.[68] In *Canney* v. *Bd. of Public Instruction of Alachua County*,[69] petitioner sought review of the board's action in suspending him from school, for failing to comply with a hair styling regulation.

While the main thrust of the opinion was concerned with the fulfillment of due process requirements in administrative proceedings, and the validity of a regulation pursuant to legislative authority in the absence of some judicial determination, the question of Government in the Sunshine arose in connection with the board's recess to reach a decision in the case.[70]

The Court held that the School Board was acting "in a quasi-judicial capacity," and the conference held by it was privileged and did not fall within the purview of the (Sunshine) statute.[71]

For purposes of controlling authority, one district is not bound by the decision of a sister district, and therein lies the basis of conflict *certiorari* to the Florida Supreme Court,[72] The District Court of Appeal for the First District observed that notwithstanding the Second District's dicta to the effect that quasi-judicial functions were not excepted by the Legislature from the application of said statute,[73] "the Legislature is not empowered, by statute or otherwise, to prescribe the conduct of the internal government of the judicial branch." [74]

The rationale used to reach this result was ambiguous at best. The Court at the outset established that the Legislature may create and vest county school boards with quasi-judicial functions; however, once so endowed with judicial [75] characteristics, the Legislature's prerogatives ceased to exist.[76]

---

[61] *Id.*

[62] *Id.*

[63] *Id.* One of the campaigning councilwomen said that, "It was my reason for running, and I feel the Sunshine Law has given us a little bit of backbone."

[64] *Id.* The two-party meeting was popularized by Orange County Commission Chairman Pickett. *See* note 60 and accompanying text.

[65] Pickett conceded that he may well be violating the intent if not the letter of the Court's order but he refused to put himself in a position of discussing charges against a county employee in public if they were unsubstantiated. *See* Op. Atty. Gen. 071–032 (1971).

[66] Two Broward County School Board employees resigned and threatened suit because of a critical remark made by a member of the Board.

[67] Tampa Tribune, August 3, 1969.

[68] *Canney* v. *Board of Public Instruction of Alachua County,* 231 So. 2d 34 (1 D.C.A. Fla. 1970) *reh. denied,* January 27, 1970.

[69] *Id.*

[70] *Id.* at 39.

[71] *Id.*

[72] Fla. Const. art. V, § 4 (2) (1968).

[73] *Time Publishing Company* v. *Williams,* 222 So. 2d 470, 474 (2d D.C.A. Fla. 1969), footnote 2.

[74] *Canney* v. *Board of Public Instruction of Alachua County,* 231 So. 2d 34 (1 D.C.A. Fla. 1970).

[75] The abrupt shift in terminology from quasi-judicial functions to judicial characteristics, is unexplained as well as unwarranted. It is this slip in terminological consistency that leads to the eventual result.

[76] *Canney* v. *Board of Public Instruction of Alachua County, supra.*

Analyzing the school board's recess to the "conference room of the Supreme court of Florida" or the "petit jury room" when the deliberations are taking place,[77] the Court held that "neither the public nor the press has any more right to enter into the judicial deliberations of the members of a county school board of public instruction . . ." [78]

RENEWED NOTICE UNNECESSARY: APPENDIX F

In *Shaughnessy* v. *Metropolitan Dade County*,[79] the Third District Court of Appeal held that a continued matter may be disposed of at a later specified meeting without the necessity of repeating the notice or public hearing requirements of the Sunshine Law.[80]

The Zoning Appeals Board of Dade County, after notice and public hearing, deadlocked over whether to grant an application for a special use permit, and set the matter over to a later specified date, and acted thereon without further notice or public hearing.[81] When the county commissioner ratified the Board's action, the appellant commenced this action.

The appellant's allegations specified that the Zoning Appeals Board failed to abide by the provisions of the Sunshine Law, in that it failed to give the required public notice about the meeting wherein the second vote was to be taken.[82]

The *per curiam* opinion held that "all official action of the Board as it appears from this record was taken in open public meeting," and did not thus violate either the provisions of the law or those appellate decisions interpreting the same.[83]

BERNS REVISITED: APPENDIX G

The following year the *Berns* case was reviewed by the Florida Supreme Court, *sub nom, City of Miami Beach* v. *Berns*,[84] The Court held on rehearing that where public officials meet at a time and place to avoid being seen or heard by the public to transact or agree to transact public business at a future time in a certain manner, they violate the Sunshine Law, regardless of the formality or lack of formality the meeting takes.[85]

Section 165.22, Florida Statutes provides in part that:

All *meetings* of any city or town council or board of aldermen of any city or town . . . shall be held open to the public . . . (emphasis added).

In *Turk* v. *Richard*,[86] a 1950 case, the Court held that the *open meeting* requirement only applied when a municipal council was assembled in a formal session attended by a quorum.

The crux of the Court's rationale in the *Berns* case, prohibiting any meeting whether or not a quorum is present, rested on the language the legislature chose *not to follow* when drafting section 286.011, Florida Statutes ". . . (I)f the intent of the Legislature had been to include only *formal assemblages* for the transaction of official business," [87] it would not have been necessary to "include a provision declaring certain meetings as public meetings." [88]

The Court opined that in enacting this piece of legislation a "general revision of the law applicable to open meetings of public agencies" was intended.[89] Therefore, in such a situation, whether or not this right to attend meetings existed at common-law, or whether or not the two statutes are harmonized, "we are

---

[77] *Id.*

[78] *Id.* It is this wording that lends credence to the belief that the decision is limited to school boards dealing with students. *Bassett, infra,* broadened the interpretation in this reporter's opinion. I feel that the courts are carving out portions of a school board's activities because of the delicate nature of their work and the potential harm facing Florida's young, impressionable school children.

[79] 238 So. 2d 466 (3rd D.C.A. Fla. 1970), *rehearing denied,* Sept. 30, 1970.

[80] The first vote resulted in a 2–2 deadlock, and the second vote, in open hearing approved the application 2–0, the balance of the quorum abstaining in accordance with the Board's rules. In accord with its own rules and general principles of administrative law, the Board continued the matter without further notice or public hearing. *See,* 2 Am. Jour. 2d, Admin. Law § 362.

[81] 238 So. 2d at 467.

[82] *Id.*

[83] *Id.* The Court cited all the cases discussed to this point.

[84] 245 So. 2d 38 (Fla. 1970), *on rehearing, original opinion withdrawn. See,* Tampa Tribune, October 8, 1970. The District Court of Appeal certified the case to the Florida Supreme Court as a question of great public interest.

[85] *Id.*

[86] 47 So. 2d 543 (Fla. 1950).

[87] 245 So. 2d at 40.

[88] *Id. See also Board of Public Instruction* v. *Doran,* 224 So. 2d 693, 698 (Fla. 1969), *supra.*

[89] 245 So. at 40.

persuaded to apply the rule that a statute enacted for the public benefit should be construed liberally in favor of the public . . .[90]

The Court then reinforced the *Williams*[91] and *Doran*[92] principles that: (1) Legislature intended to expand the open meeting concept to bind every political subdivision or agency over which it has dominion; (2) the obvious intent was to cover gatherings where the individuals will deal with matters on which *foreseeable action* may be taken at a later time; and (3) the proscriptive conduct [(1) & (2)] is not to be circumvented by matters that are privileged, pertaining to the duties and responsibilities of subject bodies.[93]

A secret meeting, the Court said, occurs when officials meet so as to avoid being seen or heard by the public.[94] Whether the meeting is formal or not, such secretive action violates the Sunshine Law. "It is the law's intent that any meeting, relating to any matter on which foreseeable action will be taken, occur openly and publicly.[95]

The opinion contains several warnings; it warns those who are in doubt whether they are convening in violation of the law to leave the meeting forthwith,[96] and it warns those who hope to push the statute beyond debatable limits that the majority of the Court will meet future problems on a case by case basis as they arise.[97] The Court stated:

"The Legislature did not intend to muzzle lawmakers and administrative boards to an unreasonable degree. It would be contrary to reason and violate the right of free speech to construe the law to prohibit any discussion whatever by public officals between meetings. *The practice of discussing politics and government is part of our American heritage . . .*"[98]

Thus if there is no intentional secrecy involved, legislators can meet and discuss their business without worry. "It is only the evil of closed door operation of government without permitting public scrutiny and participation" that the law seeks to prohibit.[99]

A joint session of the City Commission of Gainesville and the Alachua County Commission at a local inn was scuttled on February 3, 1971, in deference to the Sunshine Law.[100] The same day the Gainesville Sun ran an editorial entitled "Statehouse Orgy;" its focus was the Sunshine Law.[101] After lauding its accomplishments the editorial continued:

"But we are disturbed by recent developments. Not only has Secretary of State Stone removed the door from his office but . . . an Associated Press . . . reporter . . . (has) . . . interrupted a corporate income tax strategy session between Governor Askew and other legislators . . . (I)t appears (that) some of these fellows are trying to love the Sunshine Law to death. What we see is an informational orgy, put on foot by officialdom and naively joined by newsmen, to make the Sunshine Law unworkable."[102]

THE TELEPHONE RULING AND "STATEHOUSE ORGY"—A REACTION: APPENDIX H

I would not call it a conspiracy, but clearly a good many politicians in Tallahassee were hoping that the news media and the people would prove the law unworkable, to provide ripe justification for repealing the same. The editorial was timely warning of a growing movement.

Just five days later, Governor Askew called for moderation in the interpretation and application of the Sunshine Law. The Governor was quoted as saying that certain "difficult areas" exist in government which do not lend themselves to coverage by newsmen, citing legislative strategy meetings as an example.[103] "The question is can you not talk to anyone about the business of the state until and unless the representatives of the press hear your every word?"

---

[90] *Id.*
[91] *Times Publishing Co.* v. *Williams,* 222 So. 2d 470 (2d D.C.A. Fla. 1969).
[92] *Board of Public Instruction of Broward County* v. *Doran,* 224 So. 2d 693 (Fla. 1969).
[93] 245 So. 2d at 41.
[94] *Id.*
[95] *Id.*
[96] *Id.*
[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] Gainesville Sun, February 3, 1971. pg. 4.
[101] *Id.* at pg. 8.
[102] *Id.*
[103] Gainsville Sun, February 8, 1971. pg. 15.

Governor Askew was required to throw open an "invitation only" dinner meeting between himself, the Cabinet and Capital Center architects, on March 10, 1971, because of the Sunshine Law.[104]

On March 3, 1971 Attorney General Shevin rendered an opinion that held *inter alia* that the press and public had the right to listen in on telephone conversations between public officials.[105]

Responding to this, H. G. "Buddy" Davis, the Pulitzer Prize winning journalist who wrote the "Statehouse Orgy" editorial in the Gainesville Sun, was quoted as saying: "When a responsible guy goes around and says two officials have to invite reporters to listen to a phone conversation—that's ridiculous." [106]

"Loving" the law to death, Davis said, "would make the law so obnoxious and so impossible, and so unworkable, it'll have to be changed or repealed. It's just that simple." [107]

Attorney General Shevin in the telephone opinion had also ruled that the phrase "at all times" prevents a board from holding a secret ballot, though the vote would be replayed at a subsequent public meeting.[108] If members of the press and the public were *deliberately excluded* from the public offices furnished for the conduct of the public's business, there would then be a Sunshine Law violation in the opinion of the Attorney General.[109]

Then perhaps Mr. Davis overstated the impact of the "telephone" ruling. Relying on *Williams* and *Doran*, certain telephone conversations which are part of the deliberative process which would ultimately lead to recorded action at a formal public meeting could not be conducted covertly.[110]

In a March 6, 1971 interview with the Gainesville Sun's Capital Bureau correspondent, the author of the Sunshine Law, J. Emory Cross, mused that the public-meeting law has suffered "telling damage from recent Court and Attorney General opinions." [111] "What they do is make it absurd," categorizing Shevin's telephone ruling as "way out" absurd.[112] The other major snafu according to Cross is the Supreme Court ruling that the law applies, even if there is less than a quorum present. "Cross said he thought that was clearly put, indicating he did not intend to prevent a couple of public officials meeting for dinner or talking on the phone for fear of violating the law." [113]

Perhaps hardest hit by the Sunshine Law are the county officials, because they work on problems requiring decisions daily. What happens when several, say two, county commissioners meet with the public utilities director, or plan board member; or if they sit down and talk over a cup of coffee; are they taking "official action?" Must they give prior notice?

Most city or county commissioners polled by the Melbourne Times in 1971 felt that it was not a violation, and if it was, then the law was too extreme.[114] If I had a choice of the Sunshine Law or nothing, I'd take the Sunshine Law." [115]

Refining the law

In an effort to clarify an earlier opinion the Attorney General of Florida opined on March 31, 1971 that if a school board voted for a new superintendent by code number rather than by name there would be no *per se* violation of the law, provided that all the facts available to the board would also be available to the public and press, and that all such votes or other actions of the board be open to the press and public.[116]

On the question of the validity or invalidity of action taken by a public body in violation of the law, it was Shevin's opinion that it is not void *ab initio*, but rather voidable, and may be corrected by subsequent re-enactment *nunc pro tunc*.[117]

---

[104] *Id.*
[105] Tampa Tribune, February 8, 1971. It should be noted that Senator Askew voted for the Cross bill.
[106] Melbourne Times, March 19, 1971. pg. 3.
[107] *Id.*
[108] *Id.* at 4. The opinion actually uses the words "purposely secret." There is no invitation requirement. *See,* Op. Atty. Gen. 071–32 (March 1971).
[109] *Id.*
[110] *Id.*
[111] Gainesville Sun, March 6, 1971. pg. 6.
[112] *Id.*
[113] *Id.*
[114] Melbourne Times, March 19, 1971.
[115] *Id.* Commissioner Steele of Brevard County.
[116] Op. Atty. Gen. 071–58. (March 1971).
[117] *Id.* The opinion contains a warning against using the *nunc pro tunc* reenactment to avoid the effect of the law.

In the 1971 Legislative session several bills were successfully introduced to modify the Sunshine Law.[118] One bill listed six exceptions to be written into the law that would have virtually repealed open-meeting requirements. The amendment provided that quasi-judicial bodies, matters of national security, land transactions, personnel problems, conferences with attorneys, and other "sensitive matters" would be allowed behind closed doors.[119]

Another defeated amendment would have provided for closed door sessions to deal with "matters which, if discussed in public, would be likely to benefit a party whose interests are adverse to those of the general community." [120]

In testimony before the House Governmental Organization and Efficiency Committee, Attorney General Shevin urged defeat of the above bills charging public officials: "Give politicians an excuse to violate the government-in-the-sunshine law, and that's what they will do." [121]

"If you give these exemptions 1-2-3-4, they will do more than 1-2-3-4 when they get behind closed doors. I think it would be a step backwards to amend this law." [122] The law, according to the Attorney General, was not hard to interpret as long as the basic point, that elected officials are to be prohibited from deliberately trying to exclude press and public, is kept in mind at all times.

Members of the Florida Society of Newspaper Editors felt that politicians were exaggerating when they said newsmen wanted to listen in on telephone conversations. "Our concern is with closed meetings or hideaway meetings by a quorum or committee with the authority to act." [123]

On May 5, 1971, four years after the bill passed into law, the first convictions under the Sunshine Law were recorded.[124] The Mayor and Vice-Mayor of Fort Lauderdale were convicted of holding "many secret" meetings, including one discussing the future dismissal of the town's police chief. This particular secret meeting was held in the back of a town police cruiser.

The Florida Sunshine Law does not apply to federal agencies operating in Florida.[125] According to an Attorney general's opinion, the Sunshine Law only applies to state agencies. The question may again be brought up, because the agency in this particular case had open meeting rules promulgated by the Director of the program, under the 1964 Economic Opportunity Act. For most purposes, section 1.01 Florida Statutes, defining "political subdivision," is applicable to determine the Sunshine Law's status and effect.

In his effort to bring the most sunshine possible to bear on public meetings, the Attorney General, in late October of 1971, announced that notice of an official meeting should be given when official matters are to be considered and discussed, even though the public body's membership is less than a quorum.[126]

On November 11, 1971, the father of the bill announced that it was never the intention of the statute to prohibit governmental bodies from appointing committees to deal with sensitive personnel matters, "as long as final action was taken publicly." [127] There is no reason why "committees of less than quorums ought not to be able to handle the gory details without throwing it all in the open." [128]

Cross welcomed the Attorney General's Opinion requiring prior notice. Cross had hoped to introduce an amendment to the law to achieve that desired goal. "it was never my intention just to let in the press and call it a public meeting." [129] The former state senator also was heard to say that the *Canney* decision's "quasi-judicial" rule would "be a tremendous blow to the Sunshine Law because every time a board wants to close a meeting it can invoke the quasijudicial ruling." [130]

In what may be the first interpretation loosening the Sunshine Law's stringent requirements, the Attorney General ruled on November 11, 1971 that members of a public body may jointly inspect the physical characteristics of a matter upon which they are to take subsequent official action.[131] Shevin ruled that even though

---

[118] Gainesville Sun, May 4, 1971, pg. 8.
[119] *Id.*
[120] *Id.*
[121] Gainesville Sun, May 7, 1971, pg. 7.
[122] *Id.*
[123] *Id.*
[124] Gainesville Sun, May 19, 1971, pg. 1.
[125] Op. Atty. Gen. 071–191 (July 1971).
[126] Op. Atty. Gen. 071–159 (June 1971).
[127] Gainesville Sun, November 9, 1971, pg. 3.
[128] *Id.*
[129] *Id.*
[130] *Id.*
[131] Op. Atty. Gen. 071–361 (November 1971).

the *public is not invited* to attend or participate, *it is not a secret meeting* which is outlawed by the Sunshine Law. The *press and staff* were *present*, which *minimizes* the posibility of *secret* action.

Is the public's receiving adequate advance notice no longer a prerequisite? Does presence of media representatives vitiate the secret meeting aspects of this particular excursion, or has it come to mean that the media may stand in place of the public to preserve the open meeting status of a public body's function?

One month later Shevin ruled that a purely advisory body is not within the purview of the law, but a body having statutory powers and duties that are governmental in nature should hold its meetings in the sunshine even though it functions only in an advisory capacity.[132]

An opinion reaching even further was published in January, 1972, holding that two or more legislators may not hold a secret meeting with the intention of excluding the press and public, so as to decide upon a course of action pertaining to legislative matters.[133] According to the opinion there would appear to be no violation if it were in full view, without prior arrangement, where the press or public could have access.

One month later, Senate President Jerry Thomas announced that the law does not apply to the Senate, but only to boards or agencies, and therefore legislators could ignore the previously noted Attorney General's Opinion.[134]

A NEW EXCEPTION IS CREATED: APPENDIX I

The latest chapter in the Sunshine Law's turbulent history concerns collective bargaining of public employees and the effect of the Sunshine Law. In *Bassett v. Braddock*[135] decided on May 17, 1972, the Florida Supreme Court held that labor negotiators employed by a school board in preliminary or tentative teacher contract negotiations could negotiate outside of public meetings without violating the Sunshine Law, and that these negotiators would be instructed or consulted by the school board privately.

The Court felt constrained to "merely affirm the lower court's action," so as not to "deny the public employees' rights to bargain collectively as guaranteed" by the Florida Constitution.[136] It could be well argued that the Court was with reservation "judicially implementing" the Constitutional collective bargaining provision in the absence of statutory guidance, without regard to the means employed.

The appellee school board's argument was simply that the statute's "intensity of the sunrays . . . could cause a damaging case of sunburn to these employees or to the public which elected the board."[137]

The Court sustained the lower court's finding of fact that "meaningful collective bargaining would be destroyed if full publicity were accorded at each step of negotiations."[138]

The public's negotiators, the Court went on, must not face the "Goliath" (employee negotiators) with all its cards exposed. There must be "an equal position" afforded the school board in relation to those with whom it must deal. "The public should not suffer a handicap at the expense of a purist view or open public meetings, so long as the ultimate debate and decisions are public and the 'official acts' and 'formal action' specified by the statute are taken in open public meetings."[139]

In this particular instance the negotiator could not bind the Board, and in fact his recommendations were later modified by the Board in open public meetings. Whether Attorney General Shevin pointed to his earlier opinion on the subject in the State's *amicus curiae* brief is unknown at this time.[140]

The Court clarifies its earlier position by shifting the emphasis from "matters on which foreseeable actions will be taken by the Board" to "official actions" taken at "meetings." Classifying the labor negotiations as preliminary delibera-

---

[132] Op. Atty. Gen. 071–380 (December 1971).
[133] Op. Atty. Gen. 072–16 (January 1972).
[134] Gainesville Sun, February 9, 1972. Jerry Thomas co-sponsored the bill in 1967. He felt that if he was correct then the law should be amended to include legislators, "but only if it strictly spelled out what specific functions were excluded."
[135] 262 So. 2d 425 (Fla. 1972).
[136] *Id.* at 476.
[137] *Id.*
[138] *Id.*
[139] *Id.* at 427.
[140] Ap. Atty. Gen. 071–32A (July 1971).

tions which "may never result in any action taken," the Court neatly comes full circle to conclude that the Sunshine Law does not apply "where there is no relationship at all to any meeting at which any foreseeable action is contemplated." [141]

In concluding its opinion the Court felt that common sense and fair play required the Board to be allowed to privately confer with its negotiator, because the public employees could do so at any time. The Court apparently forgot that public employees do not have the right to strike under the 1968 constitution.

In a stinging dissent, Justice Adkins declared: "Thus far the government in the sunshine law has withstood various attacks where a few misguided local boards and agencies have attempted to seek a means by which they could circumvent the law so as to resume secret meetings.[142]

"The right of the public to be present, to be heard, and to participate should not be circumvented by having secret meetings of various committees appointed by the Board and vested with authority to make recommendations or suggestions to the Board concerning a matter on which foreseeable action may be taken." [143]

CONCLUSION—THE FUTURE—THE AUTHOR

Perhaps more than anything else this history of the Sunshine Law has indicated several of the problems, potential solutions, opinions and reactions to the Government in the Sunshine Law. I have deliberately waited to this point to relate my own interview with the law's author, Emory Cross.[144]

Mr. Cross's major concern is two fold: (1) The debilitating effect of the "quasi-judicial" exception; and (2) "Shevin's absurd ruling" that the law applies when two or more public officials congregate. "The quasi-judicial ruling in *Canney* is like Lincoln's old saying: calling a dog's tail a leg does not make it so—calling an agency quasi-judicial does not make it so." As to the Attorney General's two-or-more ruling, Cross cannot understand it," Shevin supported the bill as a legislator in 1967, how could he do this! I meant a quorum, because final action is impossible without a quorum. If they had interpreted it like I wrote it, they would have been able to exempt personnel problems."

When I queried the former Senator as to some of the oddities the law fostered he became emotional, claiming he never thought the media would crash a cabinet meeting unless there was a quorum present. Also, he felt that Jerry Thomas was wrong—"The Senate is included in the law—the new constitution cuts down the right to go into executive session—right down to the bone."

Cross feels that had the courts not fumbled the "final action" notion, the main argument (personnel problems) against the law would have withered away. Cross likes to tell an anecdote to those who favor secret personnel sessions. He tells the story of the Racing Commission attorney who argued in favor of secrecy because "we get all kinds of addicts and felons etc. applying for jobs, and well—occasionally one slips by us." My goodness, bellowed Cross, that's exactly why we need the law!

The former Senator is sure that there are "people working underground to screw it up. Legislators dislike it but they are afraid to change it because the press and the public like it." Because of this he doubts if any amendments will pass for quite some time: "The media has a right and a responsibility to be there and inform the people—they have acquired the responsibility to see it is not repealed."

When I questioned the former state senator on his views on amendments he offered three:

(1) spell out the need for a quorum to reverse Shevin's ruling;

(2) include quasi-judicial functions of administrative agencies (reverse *Canney*);

(3) require the prior publication of agendas at all regularly scheduled meetings, and also at special meetings if there is sufficient time to do so.

On the possibility of a federal "Sunshine Law" he thought it was feasible provided that some court or body not subject to the law could determine before hand whether certain items were "national secret" exceptions.

Mr. CHILES. Mr. President, Florida government and citizens of the Sunshine State have greatly benefited from the law. Certainly, our government there is not perfect, but it is open and more effective, I think.

---

[141] *Bassett v. Braddock*, 262 So. 2d 425, at 427.
[142] *Id.* at 429.
[143] *Id.* at 430.
[144] One hour interview with Senator Cross at his Gainesville office, July 7, 1972.

I ask unanimous consent that a recent excellent review of the Florida law by Ruth Mayes Barnes be printed in the Record.

There being no objection, the review was ordered to be printed in the Record, as follows:

GOVERNMENT IN THE SUNSHINE: PROMISE OR PLACEBO?

In 1967 the Florida Legislature enacted the "Government in the Sunshine Law,"[1] which attempts to open the deliberations of state and local governments to the public. Since its passage, the Sunshine Law has been the subject of continued debate. This note attempts to place this debate in perspective by examining the scope and effect of the Act, analyzing cases and statutes of Florida and other states having similar laws, and evaluating the statute's present and potential impact.

THE DEMAND FOR OPEN GOVERNMENT

The supporters of senate bill 9 (later the Sunshine Law) felt that certain state and local practices, manifested in closed meetings and behind-the-scenes manipulation, indicated an urgent need for abolition of secretive government practices.[2] However, without media influence and pressure, "Government in the Sunshine" might never have survived committee action. In 1967 reapportionment of the legislature had increased the proportional representation of the urban centers in central and South Florida. Generally, the urban representatives were more sensitive to the influence of the media than the rural legislators who dominated the legislature before reapportionment. The media's active endorsement of the measure helped convince the legislators of the popularity of an open meeting regulation and provided significant impetus for passage of the Sunshine Law.[3]

Legislative recognition of the desire for open government was not unique to Florida. Five other states enacted open-meeting laws while Florida's bill was being debated.[4] The increased demands for open government in the United States since World War II seem to have had no specific origin, but an aversion to undue centralization and irresponsible government revealed itself in such political issues as reapportionment and home rule. The emergence of an affluent and better educated society whose attention focused on sophisticated issues strengthened the demands for political responsibility. The increased impact of mass media on society played an important role in directing public attention to inadequacies and abuses of government. Whatever its source, the public's urge to participate more fully in legislative decisions was evident.

In Florida, while not all governmental units were felt to be deceptive or corrupt, closed sessions provided a shield for occasional instances of irresponsibility and corruption that public disclosure might have prevented. Furthermore, testimony before the house committees revealed that the existing need for more responsible government was not confined to the local level. One of the state commissions advised that the law not be enacted because many of the commission's applicants for employment were convicted felons, known drug addicts, or otherwise unqualified for state employment. The commission disclosed that it sometimes employed these people either unknowingly or inadvertently and urged that such practices should not be exposed.[5] In reaction, proponents of the Sunshine Law demanded the inclusion of personnel matters in the Act and emphasized that this testimony indicated an immediate need for the bill.[6]

LEGISLATIVE HISTORY OF GOVERNMENT IN THE SUNSHINE

After its passage in the Senate,[7] the "Government in the Sunshine Law" was submitted to the house, where several amendments were proposed.[8] Although

---

[1] Fla. Stat. § 286.011 (1969).

[2] Interview with J. Emory Cross, State Senator from Gainesville, Florida, in Gainesville, Florida, April 14, 1970; interview with John S. Rawls, Judge, First District Court of Appeal, in Tallahassee, Florida, March 26, 1970 [hereinafter cited as interviews].

[3] Interviews, note 2 *supra*.

[4] Ark. Stat. Ann. § 12–12805 (1968); Cal Gov's Code §§ 54950–60 (West 1966); Ind. Ann Stat. §§ 57–601 *et seq.* (1967); N.J. Rev. Stat. §§ 10:4–1 *et seq.* (Supp. 1963); N.M. Stat. Ann. § 5–6–17 (1953). It should be noted that the Florida bill was debated for ten years. It was introduced in every regular session of the legislature from 1957 until its passage in 1967.

[5] Interview with J. Emory Cross, note 2 *supra*.

[6] *Id.*

[7] Fla. S. Jour. 958–59 (June 1967).

[8] Fla. H.R. Jour. 958–59 (June 1967).

some of these amendments might have resolved subsequent problems concerning the law's applicability, the senate refused to concur in any restriction of its original proposal.[9] As a result, only one amendment was adopted at the Act's passage, and that amendment gave the law additional impact. It provided standing to any citizen of the state, jurisdiction in the circuit courts, and injunctive relief to enable citizens to protect their new right.[10] The Sunshine Law, as finally enacted, states:[11]

"(1) All meetings of any board or commission of any state agency of authority or of any agency or authority of any county, municipal corporation or any political subdivision, except as otherwise provided in the constitution, at which official acts are to be taken are declared to be public meetings open to the public at all times, and no resolution, rule, regulation or formal action shall be considered binding except as taken or made at such meeting.

"(2) The minutes of a meeting of any such board or commission of any such state agency or authority shall be promptly recorded and such records shall be open to public inspection. The circuit courts of this state shall have jurisdiction to issue injunctions to enforce the purposes of this section upon application by any citizen of this state.

"(3) Any person who is a member of a board or commission or of any state agency or authority of any county, municipal corporation or any political subdivision who violates the provisions of this section by attending a meeting not held in accordance with the provisions thereof is guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not more than five hundred dollars ($500.00), or by imprisonment in the county jail for not more than six (6) months, or by both such fine and imprisonment."

PRECEDENT FOR THE SUNSHINE LAW

Florida's statute is not without precedent. Other states, especially western ones, have supported open meetings in constitutions,[12] statutes,[13] and case law.[14] In 1953 New Mexico[15] and California[16] were the first states to pass comprehensive open meeting laws, which are similiar to the Florida act. New Mexico's law requires that all final decisions of all governing bodies of state or local subdivisions supported by public funds be made at public meetings.[17] California's comprehensive Brown Act is limited in its application to local government levels, but it applies even to library boards and recreation commissions.[18] Moreover, Florida Statutes, section 165.22, is precedent for the Sunshine Law. Enacted in 1905, that section requires that all city and town meetings be open to the public. On its face, the Sunshine Law seems to reiterate the provisions of this earlier statute, which declares:[19]

"All meetings of any city or town council or board of aldermen of any city or town in the state, shall be held open to the public of any such city or town, and all records and books of any such city or town shall be at all times open to the inspection of any of the citizens thereof.

---

[9] The House considered repeal of the existing public meeting law applicable to city and town councils, exemption of purely administrative acts of affected agencies, and specific inclusion of the Florida Education Association within the scope of the Act. The representatives rejected these proposals, but submitted the following for senate approval: an amendment giving circuit courts jurisdiction to issue injunctions to enforce the statute, an amendment granting an exemption from application of the law to hearings involving individuals charged with violation of law or regulations respecting employment, and an amendment prohibiting application of the enforcement provisions of the Act to personnel matters. Fla. S. Jour. 679 (June 1967); Fla. H.R. Jour. 958–59 (June 1967).

[10] Fla. S. Jour. 679 (June 1967).

[11] Fla. Stat. § 286.001 (1969).

[12] The Texas Constitution states that all trials must be open to the public. In 1935 the Texas Court of Civil Appeals held that the relevant section applied to the county commissioner's court: "They [the commissioners] meet as a court and transact the county business in open session. Such requirement . . . is substantial, both that the members may have the benefit of the knowledge and opinions of the other members, as well as that the public may know when and where its affairs are being transacted." *Tarrant County* v. *Smith*, 81 S.W. 2d 537, 538 (Tex. Civ. App. 1935).

[13] Cal. Gov't Code §§ 54950–60 (West 1966); N.M. Stat. Ann § 5–6–17 (1953); Utah Rev. Stat. § 202 (1898).

[14] *Tarrant County* v. *Smith*, 81 S.W. 2d 537 (Tex. Civ. App. 1935); *Acord* v. *Booth*, 33 Utah 279, 93 P. 734 (1908).

[15] N.M. Stat. Ann. § 5–6–17 (1953).

[16] Cal. Gov't Code §§ 54950–60 (West 1966).

[17] N.M. Stat. Ann. § 5–6–17 (1953).

[18] Cal. Gov't Code §§ 54952.5, 5493 (West 1966).

[19] Fla. Stat. §§ 165.22 (1969).

In addition to a fine or imprisonment enforcement provision, the earlier law demands vacation of office by any violator of the act.[20]

However, in *Turk* v. *Richard*[21] the Supreme Court of Florida considerably limited the effect of section 165.22 by enunciating the so-called "formal meeting" doctrine. The early law was held applicable only to "formal assemblies of the council sitting as a joint deliberative body as . . . required or authorized by law . . . [and] held for the transaction of official municipal business. . . ."[22] Thus the statute, which opened meetings of city or town councils or boards of aldermen to the public, was coupled with a judicial interpretation requiring potential voting as a necessary prerequisite for the enforcement of open meetings. As a result, city and town government meetings were required to be open only when votes "could be taken, though [they were] not necessarily certain to be taken."[23] The narrow literal scope of the statute and its further limitation by the judiciary left much governmental activity immune from public scrutiny. For this reason, the 1905 law was largely ineffective.

PRESENT CONSTRUCTION OF GOVERNMENT IN THE SUNSHINE

Superficially, the Government in the Sunshine Law seems similar to its town council predecessor. However, relying on legislative intent, the Florida courts have given the Sunshine Law wider application than the former act.[24] Because the Sunshine Law appears overly broad and ambiguous in certain areas, it was challenged on the ground that it was "void for vagueness."[25] Opponents of the statute asserted it violated the constitutional doctrine that a "statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law."[26] Rejecting this contention, the Florida supreme court held that the law properly expressed its legislative intent and provided a substantially clear mandate.[27]

Although the Sunshine Law is constitutionally valid, the breadth of its language has raised problems of construction. The terms of the law are not tempered by any practical exceptions, nor do they provide precise guidelines for operational compliance. Judicial interpretation has corrected some of the drafting flaws, but three basic, interrelated legal issues remain. The Sunshine Law does not state which bodies are *not* affected by the law; it does not exclude any types of deliberation from its scope; and it fails to recognize any stage in the deliberative process that might not be subject to the requirements of the Act. While courts have not explicitly delineated the issues in this manner, the Second District Court of Appeal indicated in *Times Publishing Co. v. Williams*,[28] that comprehension of the full meaning of the law requires such analytical divisions.

No Florida court has faced the question of which agencies might fall outside the application of the law. The only litigation to date deals with those agencies to which inherent applicability is assumed, such as city councils and boards of education.[29] The language of the Act applies to all facets of government;[30] however, the question of applicability is unresolved with regard to groups such as ad hoc committees, which act in a purely advisory capacity.

It is conceivable that unlimited application of the law could produce undesirable results. The goals of certain investigatory groups, such as those fighting organized crime, might be jeopardized by premature exposure of important procedures and information. Where an ad hoc committee is purely advisory and exercises no real powers, where it reaches no final determination, and where its findings will result in later action by an authority subject to the Sunshine Laws or the courts, the application of the law could create ineffectiveness or inefficiency to the disadvantage of the state. One solution to the dilem-

---

[20] *Id.*

[21] 47 So. 2d 543 (Fla. 1950).

[22] *Id* at 544.

[23] *Times Publishing Co.* v. *Williams*, 222 So. 2d 470, 473 (2d D.C.A. Fla. 1969).

[24] *See* Miami Beach v. Berns, 245 So. 2d 38 (Fla. 1971), *aff'g* 231 So. 2d 847 (3d D.C.A. Fla. 1970), *aff'g* 32 Fla. Sup. 7 (11th Cir. 1969); *Board of Pub. Instr.* v. *Doran*, 224 So. 2d 693 (Fla. 1969); *Carreu* v. *Board of Pub. Instr.*, 231 So. 2d 34 (1st D.C.A. Fla. 1970); Times Publishing Co v. Williams, 222 So. 2d 470 (2d D.C.A. Fla. 1969).

[25] *Board of Pub. Instr.* v. *Doran*, 224 So. 2d 693 (Fla. 1969).

[26] *Connally* v. *General Constr. Co.*, 269 U.S. 385, 391 (1926).

[27] *Board of Pub. Instr.* v. *Doran*, 224 So. 2d 693 (Fla. 1969).

[28] 222 So. 2d 470 (2d D.C.A. Fla. 1969)

[29] *Board of Pub. Instr.* v. *Doran*, 224 So. 2d 693 (Fla. 1969); *Canney* v. *Board of Pub. Instr.*, 231 So. 2d 34 (1st D.C.A. Fla. 1970); *Times Publishing Co.* v. *Williams*, 222 So. 2d 470 (2d D.C.A. Fla. 1969); *Berns* v. *Miami Beach*, 32 Fla. Supp. 7 (11th Cir. 1969).

[30] *See* text accompanying note 11 *supra*.

ma would be to require only that such a committee state publicly the purpose of the group and announce its membership. In such instances, especially in investigatory actions, the committee should be entitled to conduct private sessions. This would accomplish minimum compliance with the basic purpose and policy of the Sunshine Law while providing for confidential meetings when necessary.

If this exception were made, a problem would arise concerning which ad hoc or advisory bodies should be excluded from application of the law. A broad exclusion would permit many to hide behind this shield and undermine the effectiveness of the law. Unless a showing of good cause is made to warrant exclusion, all such groups will remain within the scope of the Sunshine Law.[31] A group in need of confidential hearings could insure its privacy by requesting a court order upon proof of the advisability of closed sessions. Such a procedure would place the burden upon the committee or group involved to show that the open meeting policy of the state was not being unnecessarily evaded.[32]

The type and stage of deliberation to which the law is applicable has in several cases been delineated by the courts. Rejecting the "formal meeting" doctrine of *Turk* v. *Richard*,[33] the court in *Times Publishing Co.* held that the law applies to the "entire decision making process." [34] The Florida supreme court upheld this interpretation in *Miami Beach* v. *Berns*,[35] and further emphasized the applicability of the Sunshine Law, even to informal assemblies, by stating that section 286.011 in effect repeals section 165.32.[36] The fact that no voting will take place at a particular meeting is no longer a bar to the necessity of open sessions.[37] Any stage in a proceeding—from proposals and reports to discussions and recommendations—is a proper subject of public scrutiny.

The ruling in *Berns* was portended by *Board of Public Instruction* v. *Doran*,[38] in which a school board, relying upon the *Turk* formal meeting doctrine, continued to hold executive sessions from which reporters were barred. The school board had asserted that only formal action was subject to the mandate of the Sunshine Law and argued that the legislature, cognized of existing case law, had only intended the new law to extend the scope of Florida Statutes, section 165.22, beyond the city and town and council level. The court provided a clue to the missing definition of "meetings" by declaring that the law "was to cover *any* gathering of the members where the members *deal with* some matter on which foreseeable action will be taken by the board." [39]

The most explicit clarification in this regard, however, is found in *Berns* v. *Miami Beach*, in which the trial judge states: [40]

"The Florida legislature has mandated that. . . . Deliberations, sessions, conferences, briefings, expressions, discussions, proposals, recommendations, actions, reports, etc. must be open and public, for these are as much 'official acts' as the final vote itself."

---

[31] *See Miami Beach* v. *Berns*, 245 So. 2d 38 (Fla. 1971).

[32] *See id.*

[33] 47 So. 2d 543 (Fla. 1950).

[34] 222 So. 2d 470, 474 (2d D.C.A. Fla. 1969).

[35] 245 So. 2d 38 (Fla. 1971). Citing *Times Publishing Co.* and *Berns* the Attorney General of Florida has stated the opinion that the use of a secret ballot to elect a school board chairman violated the Sunshine Law. Op. Att'y Gen. Fla. (Jan. 27, 1971).

[36] *Id* at 40.

[37] The court clearly rejected any requirement of a quorum by stating: "[W]e have held that the open door policy announced by the statute applies to informal as well as formal meetings of a board at which there is a collective decision or collective commitment of a majority of the members to take action in a particular manner on a matter affecting the public. Any action so taken is an official act within the contemplation of the statute and rule which we have announced. When a minority of the members meet to investigate or discuss a public matter then it becomes a factual issue to determine in each case whether the majority has fragmentized itself into minority groups merely to collaborate on a decision in private for the purpose of thus secretly concluding the matter." *Id.* at ——. The Attorney General of Florida has stated, however, that an informal telephone conversation or an informal discussion between two or more school board members is not a prosecutable offense" if there is no attempt to exclude any member of the public or press seeking admission to the place of discussion." Where a quorum is present at informal meeting, however, "the obligation rests on the board members to discontinue meeting or discussion of public business until reasonable notice . . . [is] given since such discussion without such notice constitutes violation." Op. Att'y Gen. Fla. (Jan. 27, 1971).

Editor's Note: Since the writing of this note the Supreme Court of Florida has affirmed the holding of the First District Court of Appeal in *Canney*. Thus, exception of quasi-Judicial matters from the effect of the Sunshine Law is now firmly established *Canney* v. *Board of Pub. Instr.*, Nos. 39,473 and 39,474 (Fla., Feb. 24, 1971).

[38] 224 So. 2d 693 (Fla. 1969).

[39] *Id.* at 698 (emphasis added).

[40] 32 Fla. Supp. 7, 9 (11th Cir. 1969).

Thus, it seems that if a group's functions are deemed subject to the law, no stage of its proceedings will be exempt.

Dicta in *Times Publishing Co.*[41] revealed that the second District Court of Appeal expressly viewed quasi-judicial deliberations [42] as subject to the provisions of the Sunshine Law. In *Canney v. Board of Public Instruction*, however, the First District Court of Appeal disagreed, holding that quasi-judicial actions do not "fall within the purview of the . . . statute." [43] *Canney* involved a decision by a school board relating to the discipline of a student. Relying upon article V, section 3, of the Florida Constitution,[44] the court emphasized that it alone had the exclusive power to order the conduct and procedure of the "internal government" of the judicial branch.[45] The opinion then stated that the legislature can vest quasi-judicial functions in a county school board, but: [46] [once it has transformed any of the board's responsibilities and duties] into that of a judicial character, its prerogatives in the matter have ceased. Neither the public nor the press has any more right to enter into the judicial deliberations of the members of a county board . . . than they have to enter into the conference room of the Supreme Court of Florida when the members of that Court are deliberating upon a judicial question or into a petit jury room when those citizens are deliberating upon their verdict."

Thus, the first exception on behalf of the government units has been carved out. The controversy stemming from this decision concerns the propriety of equating quasi-judicial functions with actions of the state judicial system. If such reasoning is proper, disciplinary matters, such as those in *Canney*, and other quasi-judicial activities will no longer be subject to the Sunshine Law; any session in which a decision affecting a private party is deliberated might be excluded from the Act's coverage. If, however, the dicta of *Times Publishing Co.* is adopted by the Florida supreme court, this exception would be eliminated. The split of opinion between the Second District Court of Appeal in *Times Publishing Co.* and the First District in *Canney* has forced the supreme court to hear the question.[47]

It is illogical to assume that no other exception to the Sunshine Law will ever exist. However, even in cases where the law's application may result in great harm, the nonexclusory nature of the law will probably cause exceptions to be developed narrowly, depending on the circumstances of each case. Nevertheless, the broadness of the statute, coupled with the recentness of its enactment, makes judicial determination vital for the resolution of problems involving the applicability of this law.

The Second District Court of Appeal in *Times Publishing Co.* dismissed contentions that the Act has generally recognized exceptions and expressly declared that personnel matters were subject to the law.[48] The court asserted there are "no exceptions . . . unless there is a constitutional impediment to such a mandate. . . ." [49] However, the 1968 Florida Constitution provides little immunity. The only provisions that have yet been recognized as impediments are article V (the judicial department), section 3 and 23,[50] dealing respectively with procedure in the judicial system and discipline of attorneys.

Recently, the Supreme Court of Florida endorsed the *Times Publishing Co.* interpretation "as being an accurate analysis of the subject statute." [51] Signifi-

---

[41] 222 So. 2d 470, 474 (2d D.C.A. Fla. 1969).

[42] Quasi-judicial is defined as "a term applied to the action, discretion, etc., of public administrative officers who are required to investigate facts, or ascertain the existence of facts, and draw conclusions from them as a basis for their official action and to exercise discretion of a judicial nature." A quasi-judicial act is defined as "a judicial act performed by one not a judge." BLACK'S LAW DICTIONARY 1411 (4th rev. ed. 1968).

[43] 231 So. 2d 34, 39 (1st D.C.A. Fla. 1970).

[44] FLA. CONST. art. V. § 3: "Practice and procedure—The practice and procedure in all courts shall be governed by rules adopted by the supreme court."

[45] *Canney* v. *Board of Pub. Instr.*, 231 So. 2d 34, 39 (1st D.C.A. Fla. 1970).

[46] *Id.*

[47] The Florida Constitution grants "conflict jurisdiction" to the supreme court when district courts of appeal are in conflict with each other. Fla. Const. art. V. § 4(2). *Canney* v. *Board of Pub. Instr.* is now pending before the court.

[48] Times Publishing Co. v. Williams, 222 So. 2d 470 (2d D.C.A. Fla. 1969).

[49] *Id.* at 473.

[50] FLA. CONST. art. V, § 23 provides: "Admission and discipline of attorneys—The Supreme Court shall have exclusive jurisdiction over the admission to the practice of law and the disciplining of persons admitted. It may provide for an agency to handle admissions subject to its supervision. It may also provide for the handling of discretionary matters in the circuit courts and the district courts of appeal, or by commissions consisting of members of the bar to be designated by it, the supreme court, subject to its supervision and review." Art. V, § 3 provides: "Practice and procedure—The practice and procedure in all courts shall be governed by rules adopted by the supreme court."

[51] *Miami Beach* v. *Berns*, 245 So. 2d. 38 (Fla. 1971).

cantly, the court in *Times* had acknowleged only one exception to the Sunshine Law and stated that while the statute "has waived attorney-client privileges with regard to the enumerated public bodies,"[52] there are other facets of the privilege to be considered.[53]

"[T]here . . . are obligations which bind the attorney . . . His professional conduct in [pending or impending litigation] . . . is governed by the Canons of Ethics . . . promulgated by the Supreme Court . . . Section 23 of Art. 5 . . . gives "exclusive" jurisdiction to the Supreme Court in the disciplining of attorneys; and this disciplinary power necessarily includes the exclusive province to proscribe rules of professional conduct the breaching of which renders an attorney amenable to such discipline. . . .

"The legislature . . . is without any authority to directly or indirectly interfere with or impair an attorney in the exercise of his ethical duties. . . ."

The court emphasized that the exception was restricted to "that area of the attorney-client relationship in which the *ethical obligations of the attorney clearly conflict* with the dictates of this statute. . . . [T]he act does not permit private consultation between the agency and its attorney in any other circumstances. . . ."[54] Hence, a governmental unit may not exercise the privilege, but an attorney may utilize it to safeguard his professional standing.[55] While partial nonrecognition of the attorney-client privilege of confidentiality may be criticized, the Florida position is not so extreme as others. Under a similar statute,[56] the Arkansas courts have ruled that the traditional lawyer's privilege is never valid.[57]

ENFORCEMENT OF THE SUNSHINE LAW

Standing to enforce the Sunshine Law has been granted by the provisions of the statute to "any citizens of this state.[58] Problems of standing are thus virtually eliminated for Floridians. Enforcement may be accomplished by injunctive relief, orders declaring past actions of meetings void, and criminal penalties.[59] *The Times Publishing Co.* decision noted: "Injunctive relief is an extraordinary remedy which issues only when justice requires and there is not adequate remedy at law, and when there is real and imminent danger or irreparable injury."[60] However, the opinion concluded that the statutory provision for injunctive relief mandates that violation of the law "constitutes an irreparable public injury."[61] Injunctions under the Sunshine Law are more easily obtainable because "one of the requisites . . . need not be proved, *i.e.*, an irreparable injury; and a mere showing that the statute has been or is clearly about to be violated fully satisfies such requirements."[62]

The Sunshine Law states: [N]o resolution, rule, regulation or formal action shall be considered binding except as taken or made at such meeting."[63] Thus, any action taken at or resulting from a meeting later declared in violation of the law is void *ab initio* and may be ignored by persons subject to such action. Invalidation of illegally enacted decisions is characteristic of similar laws that were passed in other states almost simultaneously with the Sunshine Law.[64] States whose laws are older have not so quickly voided such action automatically.[65]

* * * * * * *

The "Right to Know Law" of New Jersey is applicable to any "group of two or more persons organized . . . to perform a public governmental function by official action."[66] Official action is defined by statute as a determination by vote.[67]

---

[52] 222 So. 2d 470, 475 (2d D.C.A. Fla. 1969).
[53] *Id.*
[54] *Id.* at 476 (emphasis added).
[55] *Id.*
[56] Ark. Stat. Ann. § 12–2805 (1968).
[57] *Laman* v. *McCord.* 245 Ark. 401, 432 S.W. 2d 753 (1968).
[58] Fla. Stat. § 286.011 (1969). This clause may present constitutional problems of privileges and immunities. For example, the Sunshine Law would not necessarily secure the right of a Georgia citizen who owns property in Florida to be present at zoning commissions' meetings, et cetera.
[59] *Id.*
[60] 222 So. 2d 470, 476 (2d D.C.A. Fla. 1969).
[61] *Id.*
[62] *Id. See also* Op. Att'y Gen. Fla. (Jan. 27, 1971).
[63] Fla. Stat. § 286.011 (1969).
[64] *See* Ark. Stat. Ann. § 12–2805 (1968); Ind. Ann. Stat. §§ 57–601 to –609 (1967).
[65] *See* Cal. Gov't Code §§ 54950–60 (West 1966); N.J. Rev. Stat. §§ 10:4–1 *et seq.* (Supp. 1963).
[66] N.J. Rev. Stat. § 10.4–2 (Supp. 1963).
[67] *Id.*

Utilizing this definition, the New Jersey courts have applied the law to zoning commissions.[88]

New Mexico's statute affects "all . . . governmental boards and commissions of the state or its subdivisions, *supported by public funds*. . . ."[89] The New Mexico judiciary has even applied this statute to a city-owned electrical company on the basis that it was supported by public funds.[90]

The Arkansas Act delineates its intended scope by stating that the law encompasses "all . . . of the governing bodies of all municipalities, counties, townships, and school districts, and all boards, bureaus, commissions, or organizations of the State of Arkansas, except Grand Juries, supported wholly or in part by public funds, or expending public funds. . . ."[91] While Arkansas courts have not been confronted with an "applicable body" question, the statute provides guidelines for use in determining each case. Presumably, the courts of Arkansas will apply their statute much as the courts of New Mexico have applied theirs.

Definitional words in the cited statutes have thus been utilized as guides for judicial interpretation and courts have applied the laws to groups such as urban renewal agencies,[92] zoning commissions,[93] and city-owned electrical companies.[94] The courts of other states may also be aided by the specific references and examples generally contained in the statutes. California, for example, specifically included library boards and recreation commissions.[95] The Florida Sunshine Law lacks this precision; yet, by its breadth, it would certainly seem to affect any of the above-mentioned agencies. Determining the groups, if any, to which the law does *not* apply, however, is another matter. It is noteworthy that Arkansas, the only other state whose courts have not adjudicated the question of applicability. also passed its law in 1967. The New Mexico and California laws were enacted in 1953. and the New Jersey statute was passed in 1963. If the experiences of other states are indicative, it seems likely that the question will arise in the Florida courts. A clarification of the bodies affected by the law would probably make the law more practicable; it could eliminate ad hoc compliance and reduce unreasonable or unintended applications.

A second flaw in the statute is its lack of a uniform minimum notice provision. Agencies and commissions may still have individual notice regulations with which citizens may be unfamiliar. An unannounced or unattended public meeting is of little use to those interested in the deliberations of a public agency. Once again, provisions in other statutes exemplify how Government in the Sunshine could be utilized more effectively by the ordinary citizen. Exceptions to any uniform notice provision would undoubtedly be necessary, however, individualized notice provisions should be the exception rather than the rule.

One statute making certain city governments subject to open meetings provides that regular meetings shall be held in a place "designated by ordinance" and special meetings may be called at any time "by written notice delivered at least three hours prior to the time specified for the proposed meeting."[96] The Arkansas statute insists that the "time and place of each regular meeting shall be furnished to anyone who requests the information. . . . In the event of emergency or special meetings the person calling such a meeting shall notify the representatives of the [media], if any, located in the county in which the meeting is to be held and which have requested to be notified . . . of the time, place and date at least two (2) hours before such a meeting takes place. . . ."[97] This statute is probably the best practical model for any amendment to Florida's statute.

A third and final omission in the Sunshine Law is its lack of reference to reporting privileges. The press and other communication media greatly stimulated the passage of the Sunshine Law[98] and maintain an active interest in its enforcement. The law is mute in relation to broadcasting privileges, however.

The Hughes Anti-Secrecy Act of Indiana,[99] which is similar to the Government

---

[88] Kramer v. Board of Adjustment, 80 N.J. Super, 454, 194 A.2d 26 (1963).
[89] N.M. Stat. Ann. § 5–6–17 (1953) (emphasis added).
[90] *Raton Publishing Serv. Co.* v. *Hobbes*, 76 N.M. 535, 417 P.2d 32 (1966).
[91] Ark Stat. Ann. § 12–2805 (1968).
[92] *Old Town Dev. Corp.* v. *Urban Renewal Agency*, 249 Cal. App. 2d 315, 57 Cal. Rptr. 426 (1967).
[93] *Kramer* v. *Board of Adjustment*, 80 N.J. Super, 454, 194 A.2d 26 (1963).
[94] *Raton Publishing Serv. Co.* v. *Hobbes*, 76 N.M. 535, 417 P.2d 32 (1966).
[95] Cal. Gov't Code § 54952.5 (West 1966).
[96] Ky. Rev. Stat. § 88.040 (Supp. 1968).
[97] Ark. Stat. Ann. § 12–2805 (1968).
[98] *See* text accompanying note 3 *supra*.
[99] Ind. Ann. Stat. §§ 57–601 to 609 (1967).

in the Sunshine Law, explicitly allows recorded or live broadcasting subject to reasonable rules and regulations. The media may be required, however, to pool recording or broadcasting facilities.[100] In their notice provisions Arkansas and California recognize the interest of the media in public meetings.[101]

Problems have arisen in other states concerning the broadcasting privilege. A New York municipality, which had open meetings, was permitted, for example, to disallow the taping of an open session by a private party, because official minutes were taken at the meeting.[102] The California standards are more practicable. California's attorney general has ruled it is within the discretion of a county board of supervisors to refuse to permit a radio station to broadcast its regular meetings.[103] The California courts, however, have ruled that "where a recorder is silent and unobtrusive and . . . does not interfere in any way with the meetings" taping should be allowed.[104] The California view seems reasonable, while the New York decision, by comparison, seems unduly restrictive. So long as the rights of others are respected by the media, there appears no reason to bar taping of public meetings.

THE SUNSHINE LAW IN PERSPECTIVE

Government in the Sunshine assures the right of the public to be present at all important meetings of governmental units that affect them. That right to be present is unqualified except in certain unusual instances. The law of Indiana explicity states the essential thrust of open meeting laws: "[P]ublic proceedings shall be open to any citizen of this state, and every citizen shall, insofar as physical facilities permit, be permitted to observe such proceedings." [105] As illustrated by the parties to the cases on the subject, the news media are apparently the most interested in exercising this right to attend. Three of the first four cases in Florida involve attempts by newspapermen to be present at "executive sessions" or closed meetings of public bodies.[106] Press utilization of open meeting provisions may also be observed in other states, such as California [107] and Indiana.[108] Television, like the newspapers, takes an active interest in Government in the Sunshine and keeps the subject before its audiences.[109]

This is not to imply, however, that the Sunshine Law and similar statutes were enacted only for the convenience of the communications media. Cases arising from public meeting laws include private suits challenging zoning decisions,[110] racial apportionment of schools,[111] disciplinary actions by school boards,[112] decisions of city electrical companies,[113] and dismissal of public personnel.[114] Open meeting laws afford interested citizens a chance to attend informal sessions to see what is decided and how the decision is reached.

CONCLUSION

Despite its unnecessary vague portions, the Government in the Sunshine Law is a step toward more open and responsible government. Definitional phrases are needed to assure a better practical application and for added clarity. The past refusal to exempt personnel matters, especially in disciplinary investigations, reports, and hearings, is unjust to those unfairly accused and should be reexamined. Additionally, the law's application to certain ad hoc and advisory groups should be reevaluated. Finally, the lack of a uniform notice provision undermines the effect of the law by making compliance with Government in the Sunshine depend in some instances upon non-existent means of informing the public of prospective meetings.

---

[100] *Id.* §§ 57–608 to 609.
[101] Ark. Stat. Ann. § 12–2805 (1968) ; Cal. Gov't Code § 54956 (West 1966).
[102] *Davidson* v. *Common Council*, 40 Misc. 2d 1053, 244 N.Y.S. 2d 385 (1963).
[103] [1960–1962] Cal. Att'y Gen. Biennial Rep. 52.
[104] *Nevens* v. *City of Chino*, 233 Cal. App. 2d 775, 778, 44 Cal. Rptr. 50, 52 (1965).
[105] Ind. Ann. Stat. § 57–604 (1967).
[106] Miami Beach v. Berns, 245 So. 2d 38 (Fla. 1971). Board of Pub. Instr. v. Doran, 224 So. 2d 693 (Fla. 1969) ; Times Publishing Co. v. Williams, 222 So. 2d 470 (2d D.C.A. Fla. 1969).
[107] *See* Sacramento Newspaper Guild v Sacramento County Bd. of Supervisors, 263 Cal. App. 2d 41, 60 Cal. Rptr. 480 (1968).
[108] Indiana is the only state that gives broadcasting special attention in its statute. *See* Ind. Ann. Stat. §§ 57–601 to –609 (1967).
[109] *See, e.g.* Editorial WJXT–TV, Jacksonville, Florida, April 21, 1970.
[110] Wolf v. Zoning Bd. of Adjustment, 79 N.J. Super. 546, 192 A.2d 305 (1963).
[111] Schults v. Board of Educ., 86 N.J. Super. 29, 205 A.2d 762 (1964).
[112] Canney v. Board of Pub. Instr., 231 So. 2d 34 (1st D.C.A. Fla. 1970).
[113] Raton Publishing Serv. Co. v. Hobbes, 76 N.M. 535, 417 P.2d (1966).
[114] Cozzolino v. City of Fontana, 136 Cal. App. 2d 608, 289 P.2d 248 (1955).

In spite of its unpolished draftsmanship, the problems presented by the Sunshine Law are easily outweighed by its potential utility. The valuable opportunity to observe and participate in government decisions is undeniably secured by the Sunshine Law. Greater precision, however, would encourage a more meaningful participation by the general public.

RUTH MAYES BARNES.

Mr. CHILES. Mr. President, I believe that a Federal Government-in-the-Sunshine Act is a logical consequence of positive State experience and the acceptance of the disclosure provisions in the Freedom of Information Act.

All of us know of the feelings of alienation and frustration so many people feel toward government these days. As government has grown, it seems to have gotten further away, out of the reach of people. It is not responsive enough; there is too little communication and too little understanding and too little trust between them. I saw the results of a recent survey conducted by the University of Connecticut in which professions were ranked according to the amount of trust the people put in them. Well, out of 20 "professions" included in the survey, politicians ranked No. 19, just ahead of used car salesmen and several notches below newspaper columnists. It reminds me of the old joke about whether you would buy a used car from a politician or not.

I believe a good deal of this problem is due to the aura of secrecy that surrounds too much of our Government—in most cases, totally unnecessary secrecy. Secrecy in government has rightly become a hot issue; for example, the Pentagon papers and the Anderson papers. These revelations have caused greater suspicion and cynicism about government, furthering the impression of bureaucracy and Congress in backroom decisions and dealing. It may be overreaction to some degree, but we cannot deny the public view of government as too closed and consequently unresponsive to people's needs.

Secrecy in government was an important theme in the recently completed Democratic National Convention. In its platform, my party pledged to transact the "public business publicly," except when the national security might be jeopardized. Let me cite a key proposal from the platform plank on "The People and the Government" which calls on Democratic Members of Congress to:

Enact "open meetings" legislation, barring the practice of conducting the public business behind closed doors. This should include so-called markup sessions by legislative committees, but should allow for exemptions involving national security and invasions of privacy. To the extent possible the same principle should apply to the Executive Branch. . .

It is the principle that I second with my bill, not for partisan reasons, but because it answers the people's needs.

The Members of this body are well aware of the criticism of Congress for its practice of closed committee proceedings. Such criticism, within and outside of the body, moved the Congress to reform some of its meeting practices in the Legislative Reform Act of 1970. The overall hope of that reform was to bring congressional deliberations under closer public scrutiny. Yet, exceptions were made for markup sessions and the committees themselves could close their deliberations by majority vote.

The first session of the 92d Congress in 1971 was the first test year for legislative reforms. I was here in my first Senate year and in my opinion the reforms proved a failure. A Congressional Quarterly report of February 1972 shows how meager the impact has been in the area of openness of meetings. Thirty-six percent of all congressional

committee meetings were closed, a slight decrease from the "prereform" year of 1970, but exactly the same percentage as in 1969. More importantly, the number of closed meetings last year was in no way significantly different from an average of 37 percent of closed sessions over the last 20 years. Another revealing statistic in the Congressional Quarterly survey was that 97 percent of those Senate committee meetings specifically designated as "business sessions"—organizing, marking up, voting, briefing sessions—were closed to the public.

If the final decision and amendment process is conducted in such an atmosphere, is there any wonder that questioning of our legislators' motives results? Even if hanky-panky is not present in such proceedings, the cloak of secrecy heavily implies its possibility. We all recognize that sound reasons exist for closed or executive sessions, and my earlier remarks identify some, but how is the public to know whether a closed meeting is held at the personal convenience of the legislator or for his personal gain?

I ask unanimous consent to have the full text of the February 8, 1972, Congressional Quarterly report on "Committee Secrecy" printed at this point in the RECORD.

There being no objection, the text was ordered to be printed in the RECORD, as follows:

COMMITTEE SECRECY: MINOR IMPACT OF REFORM ACT

Congressional committees conducted more than a third of their 1971 meetings in secret during the year in which the Legislative Reorganization Act of 1970—aimed, in part, at opening proceedings to the public—went into effect.

Thirty-six percent of all congressional committee hearings and meetings were held behind closed doors in 1971. This marked a decrease from the 41 percent recorded in 1970. but matched the secrecy score for 1969. The pattern of the past few Congresses has been to hold more open meetings in the first session than in the second. (1970 Almanac p. 1117)

The House, as in the past, had the higher percentage of closed meetings. It barred the public from 41 percent of its committee sessions in 1971. This was down from the 48 percent of 1970 but comparable to the 42 percent closed meetings in 1969.

Senate committees had an over-all secrecy score of 30 percent—less than the 33 percent of 1970, yet greater than the 28 percent recorded in 1969. Joint committees continued to report a low number of executive meetings: 20 out of a total of 126.

Since 1953, when Congressional Quarterly began its annual study of open and closed committee meetings, 23,720—or 37 percent—of the 64,231 meetings reported have been closed to the public. Statistics on committee meetings are given below. (Standards used in compiling the study, box this page.)

Year	Total meetings	Number closed	Percent closed
1953	[1] 2,640	892	[1] 35
1954	[1] 3,002	1,243	[1] 41
1955	[1] 2,940	1,055	[1] 36
1956	[1] 3,120	1,130	[1] 36
1957	[1] 2,517	854	[1] 34
1958	[1] 3,472	1,167	[1] 34
1959	[1] 3,152	940	30
1960	[1] 2,424	840	[1] 35
1961	[1] 3,159	1,109	[1] 35
1962	[1] 2,929	991	[1] 34
1963	[1] 3,868	1,463	[1] 38
1964	[1] 2,393	763	[1] 32
1965	3,903	1,537	39
1966	3,869	1,626	42
1967	4,412	1,716	39
1968	3,080	1,328	43
1969	4,029	1,470	36
1970	4,506	1,865	41
1971	4,816	1,731	36
Total [1]	64,231	23,720	37

[1] Meetings of the House Appropriations Committee, all reported closed until 1971, were not included in the study until 1965.

80-459 O - 77 - 5

House Appropriations: One of the noteworthy developments in 1971 was the opening of selected House Appropriations Committee hearings. Although only 8 percent of its sessions—36 of a total of 455—were open to the public, this was a contrast to the zero percent recorded in the past. (Committee staff members reported several open meetings in 1970; however, since these were carried as executive sessions in the daily digest, they were listed as closed in Congressional Quarterly's tabulations.)

The Legislative Reorganization Act of 1970 stipulated that House appropriations budget hearings are to be held in open session, except when the committee determines that the testimony may affect national security. (*1970 Almanac p. 447*)

Other House Committees: Ways and Means was the only other House committee, besides Appropriations, to meet more than 100 times and close its doors more often than not. It closed 69 of its 111 sessions for a secrecy score of 62 percent.

The House Judiciary Committee closed 47 percent of its 150 meetings. The number of closed sessions held by the House Armed Services Committee continued to decline in 1971. The committee secluded itself 41 percent of the time, as compared to 57 percent in 1970 and 64 percent in 1969.

The Education and Labor Committee remained at the top of the list of committees which met more than 100 times and most often in open session. The committee closed only six of its 199 meetings for a secrecy score of 3 percent.

Other committees which met more than 100 times with comparatively few closed sessions were Interior and Insular Affairs, 20 percent closed sessions; Government Operations, 22 percent; Interstate and Foreign Commerce, 24 percent; Foreign Affairs, 28 percent; Public Works and Merchant Marine and Fisheries, both with 31 percent.

Senate Committees: Only one of the Senate committees which met more than 100 times held the majority of its meetings in executive session. The Armed Services Committee closed 118 of its 150 meetings, or 79 percent. Public Works barred outsiders from 50 percent of its sessions. Foreign Relations closed its doors 43 percent of the time.

Senate Judiciary was the leader of committees which met more than 100 times and often in open session. It closed only 15 percent of its 167 meetings. Both Interior and Insular Affairs and Labor and Public Welfare closed 20 percent of their meetings; Commerce, 21 percent; Appropriations, 30 percent.

Joint Committees: Few executive sessions were held by joint congressional committees. Of the 126 meetings reported in the daily digest, only 20, or 16 percent, were closed. The Joint Economic Committee, which met the most frequently, barred the public from only two of its 76 meetings.

Legislative Reform: In 1970, Congress passed its first reform act in 24 years. The Legislative Reorganization Act contained a number of provisions affecting the conduct of congressional committee meetings. A main thrust was to bring committee proceedings under public security. The reform legislation provided for making public the outcome of committee roll-call votes.

It stipulated that Senate committee business meetings are to be open except for markup (when a committee revises, amends and decides on the final language of a bill) and voting sessions. Senate committees also could close their business meetings by majority vote.

Ninety-seven percent of those Senate committee meetings specifically designated in the daily digest as business sessions—organizing, marking-up, voting, briefing sessions—were closed to the public.

The Reorganization Act also stated that House committee business meetings were to be open, except when the committee closed it by majority vote. Excluding the House Appropriations Committee, 79 percent of the sessions listed as business were held behind closed door. (House Appropriations meetings were not included in these tabulations because subcommittee mark-up sessions were not reported to the Record.)

Public mark-up sessions are rare. Most committees prefer to write legislation in private for a variety of reasons. Some members believe that open meetings tend to encourage greater posturing and longer speeches for public consumption. Others think committee action is hindered by the necessity of observing formal procedures. One committee, which held open mark-up sessions in the past but not in 1971, found that the open meetings usually attracted more lobbyists than public.

Open mark-up sessions: The House Education and Labor Committee, which had the lowest over-all secrecy score of House committees holding more than 100

meetings, also led in the open business meeting category. Of those specified as business sessions, the committee closed its doors six out of 60 times.

The House Education and Labor Committee's practice of opening mark-up sessions to the public began during heated debate over anti-poverty legislation in 1967, the year Rep. Carl D. Perkins (D–Ky.) became chairman. Perkins opened the sessions when Republican committee members prevented action by boycotting meetings, while keeping someone in attendance to protest that a quorum was not present.

At that time Perkins stated: "If they (the Republicans) want to kill this bill then they're going to have to do it on the floor, out in the open and for the record. We're not going to let them do it behind closed doors." (1967 Weekly Report p. 2121)

Donald M. Baker, chief clerk of the House Education and Labor Committee, told Congressional Quarterly that he did not think open meetings had hampered committee proceedings and called it "a very good rule."

House Interior and Insular Affairs opened 30 of its 55 mark-up sessions. The Subcommittee on Territorial and Insular Affairs began marking up in open session in 1971 under the direction of its new chairman, Rep. Phillip Burton (D Calif.). Burton also serves on the Education and Labor Committee.

Another committee to mark up in open session in 1971 was House Post Office and Civil Service. The committee voted to open these sessions as a result of the Legislative Reorganization Act of 1970.

Committee Hearings: The 1970 Legislative Reorganization Act contained provisions concerning hearings. It required that House and Senate committees, with the exceptions of the Senate Appropriations and House Rules Committees, announce the date, place and subject of hearings at least one week in advance, unless the committee finds good cause for beginning them earlier. Provision for radio and television coverage of open committee meetings was contained in the legislation. Prior to the passage of the act, such coverage was permitted in the Senate but not in the House.

The reorganization law provided for the opening of more hearings. It stipulated that Senate hearings would be open except when the committee determines that testimony may relate to national security, may tend to reflect adversely on the character or reputation of an individual or may divulge matters deemed confidential under other provisions of law or government regulation.

GROUND RULES

Statistics in Congressional Quarterly's open-closed committee study were derived primarily from information published in the daily digest section of the *Congressional Record*, the official journal of Senate and House proceedings. Section 221 of the Legislative Reorganization Act of 1946 (now Section 905, Title 44, United States Code) required:

"The Joint Committee on Printing shall provide for printing in the daily Record the legislative program for the day together with a list of congressional committee meetings and hearings and the place of meetings and subject matter. It shall cause a brief résumé of congressional activities for the previous day to be incorporated in the Record. . . ."

In practice, however, not all committee meetings were listed in the Record. Committees used different criteria as to what constituted a meeting. Some did not report their meetings regularly to the Record; some said they reported their meetings but they were not carried in the Record.

Open meetings followed by closed meetings are counted twice—once in each category. Joint meetings of separate committees or subcommittees are counted as one meeting for each. A meeting of a subcommittee is counted as a meeting of the full committee.

The tabulations exclude meetings when Congress was not in regular session; meetings outside of Washington, D.C.; meetings of conference committees to reconcile conflicting Senate and House versions of bills; informal meetings of the House Rules Committee to consider sending legislation to the floor (but Rules Committee meetings for other purposes are included).

Meetings held by the House Appropriations Committee were not always reported to the Record. The CQ tally for the Appropriations Committee was made from a Record list of meetings scheduled. The Senate Select Committee on Standards and Conduct did not report its meetings, all closed, to the Record nor state the number of times it met.

OPEN AND CLOSED CONGRESSIONAL COMMITTEE MEETINGS, 1969–71

	1969				1970				1971			
	Open	Closed	Total	Percent closed	Open	Closed	Total	Percent closed	Open	Closed	Total	Percent closed
Senate committees:												
Aeronautical and Space Sciences	7	7	14	50	12	3	15	20	7	3	10	30
Agriculture and Forestry	25	10	35	29	20	27	47	57	39	19	58	33
Appropriations	176	59	235	25	182	76	258	29	220	94	314	30
Armed Services	30	38	68	56	26	94	120	78	32	118	150	79
Banking, Housing and Urban Affairs [1]	86	27	113	24	60	29	89	33	72	22	94	23
Commerce	91	20	111	18	130	32	162	20	159	43	202	21
District of Columbia	54	6	60	10	29	6	35	17	27	5	32	16
Finance	41	28	69	41	50	36	86	42	35	31	66	47
Foreign Relations	63	63	126	50	62	65	127	51	72	55	127	43
Government Operations	95	14	109	13	45	12	57	21	84	9	93	10
Interior and Insular Affairs	60	30	90	33	88	37	125	30	90	23	113	20
Judiciary	78	14	92	15	138	29	167	17	142	25	167	15
Labor and Public Welfare	127	48	175	27	129	49	178	28	171	43	214	20
Post Office and Civil Service	33	12	45	27	6	15	21	71	16	10	26	38
Public Works	46	31	77	40	91	43	134	32	52	52	104	50
Rules and Administration	4	15	19	79	5	14	19	74	8	17	25	68
Select Equal Educational Opportunity [2]	(3)	(3)	(3)	(3)	45	4	49	8	30	4	34	12
Select Nutrition and Human Needs	12	1	13	8	18	4	22	18	18	2	20	10
Select Small Business	34	1	35	3	24	1	25	4	21	1	22	5
Select Standards and Conduct	(4)	(4)	(4)	(4)	(4)	(4)	(4)	(4)	(4)	(4)	(4)	(4)
Special Aging	23	3	26	12	16	0	16	0	17	0	17	0
Veterans' Affairs [3]	(3)	(3)	(3)	(3)	(3)	(3)	(3)	(3)	13	4	17	24
Total	1,085	427	1,512	28	1,176	576	1,752	33	1,325	580	1,905	30

House committees:												
Agriculture	83	45	128	35	32	99	131	76	110	64	174	37
Appropriations [6]	0	330	330	100	0	379	379	100	36	419	455	92
Armed Services	59	105	164	64	92	123	215	57	110	78	188	41
Banking and Currency	70	22	92	24	73	27	100	27	52	26	78	33
District of Columbia	50	23	73	32	49	35	84	42	53	37	90	41
Education and Labor	180	20	200	10	205	15	220	7	193	6	199	3
Foreign Affairs	79	73	152	48	133	43	176	24	136	52	188	28
Government Operations	90	29	119	24	69	19	88	22	131	36	167	22
House Administration	5	36	41	88	7	58	65	89	9	47	56	84
Interior and Insular Affairs	86	25	110	23	111	36	147	24	101	26	127	20
Internal Security	24	4	28	14	41	8	49	16	43	22	65	34
Interstate and Foreign Commerce	122	45	167	27	144	113	257	44	173	56	229	24
Judiciary	94	66	160	41	97	77	174	44	80	70	150	47
Merchant Marine and Fisheries	86	21	107	20	69	36	105	34	84	37	121	31
Post Office and Civil Service	90	35	125	28	45	30	75	40	88	3	91	3
Public Works	52	27	79	34	57	41	98	42	74	33	107	31
Rules	27	15	42	36	24	6	30	20	22	4	26	15
Science and Astronautics	64	21	85	25	38	14	52	27	47	15	62	24
Select Crime Investigation [7]	14	5	19	26	4	6	10	60	15	5	20	25
Select Small Business	31	0	31	0	26	0	26	0	29	1	30	3
Standards of Official Conduct	0	14	14	100	8	12	20	60	1	13	14	93
Veterans' Affairs	20	13	33	39	20	11	31	35	25	12	37	32
Ways and Means	65	50	115	43	36	84	120	70	42	69	111	62
Total	1,390	1,024	2,414	42	1,380	1,272	2,652	48	1,654	1,131	2,785	41
Joint Committees:												
Atomic Energy	28	12	40	30	21	15	36	42	22	12	34	35
Congressional Operations [5]	(3)	(3)	(3)	(3)	(3)	(3)	(3)	(3)	6	3	9	33
Defense Production	0	1	1	100	0	0	0	0	3	1	4	25
Economic	56	5	61	8	64	0	64	0	74	2	76	3
Others [8]	0	1	1	100	0	2	2	100	1	2	3	67
Total	84	19	103	18	85	17	102	17	106	20	126	16
Grand total	2,559	1,470	4,029	36	2,641	1,865	4,506	41	3,085	1,731	4,816	36

[1] Formerly Banking and Currency Committee; renamed by the Legislative Reorganization Act of 1970.
[2] Created Feb. 19, 1970, by S. Res. 359.
[3] Created Jan. 28, 1971, S. Res. 16.
[4] Not available.
[5] Created by the Legislative Reorganization Act of 1970.
[6] Committee staff members reported one open meeting on the District of Columbia appropriations and 8 open meetings on public works in 1970. However, since these were reported as closed in the Daily Digest, they were carried as executive sessions in tabulations.
[7] Created May 1, 1969, by H. Res. 17.
[8] In 1969 includes Joint Committees on Internal Revenue Taxation, Library, Printing, Reduction of Nonessential Federal Expenditures; in 1970 includes Printing; in 1971 includes Library, Printing.

Mr. CHILES. Mr. President, the closed-door practice in Congress is contrary to the spirit of our Constitution and the intent of its framers. Article I, section 5 of the Constitution provides that—

> Each House shall keep a journal of its proceedings, and from time to time publish the same, except such parts as may in their judgment require secrecy . . .

The aim of this provision was to insure that the public's business be conducted in public; this in direct reaction to and desire to avoid the English parliamentary practice of closed sessions.

Living today as we do in a complex time when people are fearing loss of identity to a growing government that threatens to completely dominate them and is ever more difficult to understand, the need is now to expose our governmental processes to the fullest extent possible. We must open the doors—and windows—and let the disinfecting sunlight in. We can but gain—better lawmaking, greater public confidence, strengthening of the democratic process itself. I urge serious consideration of the legislation and its merits.

[From the Congressional Record—Senate, January 9, 1973]

(S 373–S 377)

Introduction of S. 260 by Senator Lawton Chiles

S. 260. A bill to provide that meetings of Government agencies and of congressional committees shall be open to the public, and for other purposes. Referred to the Committee on Government Operations.

GOVERNMENT IN THE SUNSHINE ACT

Mr. Chiles. Mr. President, I ask unanimous consent that a copy of the legislation being introduced and a section-by-section analysis be printed in full at the end of my statement.

The Presiding Officer. Without objection, it is so ordered.

[See exhibits 1 and 2.]

Mr. Chiles. Mr. President, Supreme Court Justice Louis D. Brandeis once wrote:

> Publicity is justly commended as a remedy for social and industrial disease. Sunlight is said to be the best disinfectant and electric light the most efficient policeman.

I believe Justice Brandeis could just as well have applied these remedies to the operation of our Government. Democratic self-government and informed citizenry just naturally go hand in hand, making essential the conduct of public business in the open, "in the sunshine." Only with such openness can the public judge and express, through its vote or voice, whether governmental decisions are just and fair.

When I first came to the Senate in 1971 I was very disturbed by the amount of public business I found being conducted behind closed doors and by the attitude of secrecy I saw in our Federal Government agencies. I am not surprised that people are suspicious of our motives and are losing confidence in their government when they are shut out of the decisionmaking process.

Near the end of the 92d Congress I introduced a bill, S. 3881, the Federal Government in the Sunshine Act—which sought to assure the openness of our governmental process and to restore public confidence in those processes.

It sought to do this through a simple requirement: All meetings of Federal agencies and congressional committees shall, subject to certain exemptions, be open to the public. Citizens would have the right to attend meetings in which they had a personal interest, and news media and other interested groups would have access which would insure a broader dissemination of information on public affairs. The proposal provided for open meetings of all Federal governmental agencies except the courts and the military.

I was pleased to see that legislation was approved last Congress by a Senate-House conference of which I was a member, which would open up meetings of the multitude of so-called advisory commissions.

Our effort to open up government to the people should clearly not be a partisan issue—and the list of Senators cointroducing the redraft of my bill, S. 3881, this morning reflects that bipartisan support.

I am deeply committed to the idea of government in the sunshine—but not wedded to the specific language of S. 3881. S. 3881 provided for certain exemptions to the openness requirement, but I knew these exemptions would have to be further specified. I knew, too, that the procedure for implementation of the sunshine law needed to be more specifically outlined. And so while the redraft we are introducing this morning retains the same concepts as S. 3881, it is somewhat more lengthy; various exemptions from the open meeting requirement for congressional committees and multimember administrative agencies have been made more specific; and committees and agencies are required to keep transcripts of all meetings and make such transcripts publicly available except for the confidential portions falling within one of the specific exemptions.

Senator Ribicoff, chairman of the Executive Reorganization Subcommittee, has indicated that hearings will be held on this proposal early this session. And I am confident this whole issue will be completely gone into and thoroughly studied.

Joining with me in the introduction of this proposal are Senators Clark, Cook, Cranston, Hart, Humphrey, Mathias, Metcalf, Mondale, Nelson, Packwood, Proxmire, Roth, Stafford, Stevenson, Tunney, and Weicker. As I stressed last year—I sincerely hope this whole area will be completely gone into and thoroughly studied. And we must start now to expose our governmental process to the fullest extent possible. I believe it is time to open the doors and windows and let the disinfecting sunshine in. Our efforts to open up Government to the people can only lead to better lawmaking and greater public confidence in our governmental system.

EXHIBIT 1

93D CONGRESS
1ST SESSION

S. 260

IN THE SENATE OF THE UNITED STATES

JANUARY 9, 1973

Mr. CHILES (for himself, Mr. CLARK, Mr. COOK, Mr. CRANSTON, Mr. GURNEY, Mr. HART, Mr. HATFIELD, Mr. HUMPHREY, Mr. MATHIAS, Mr. METCALF, Mr. MONDALE, Mr. NELSON, Mr. PACKWOOD, Mr. PROXMIRE, Mr. ROTH, Mr. STAFFORD, Mr. STEVENSON, Mr. TUNNEY, and Mr. WEICKER) introduced the following bill; which was read twice and referred to the Committee on Government Operations

A BILL

To provide that meetings of Government agencies and of congressional committees shall be open to the public, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 SECTION 1. SHORT TITLE.—This Act may be cited as
4 the "Government in the Sunshine Act".
5 SEC. 2. DECLARATION OF POLICY.—It is hereby
6 declared to be the policy of the United States that the public
7 is entitled to the fullest practicable information regarding
8 the decisionmaking processes of the Federal Government.

1 SEC. 3. DEFINITIONS.—For purposes of this Act—
2 (1) "National security" means—
3 (A) the protection of the United States against
4 actual or potential attack or other hostile acts of a foreign
5 power;
6 (B) the obtaining of foreign intelligence information
7 deemed essential to the security of the United States;
8 (C) the protection of national security information
9 against foreign intelligence activities; or
10 (D) the protection, to the extent deemed necessary
11 by the President of the United States against the over-
12 throw of the Government by force; and
13 (2) "Person" includes an individual, partnership, cor-
14 poration, associated governmental authority, or public or
15 private organization.

16 TITLE I—CONGRESSIONAL PROCEDURES

17 SEC. 101. SENATE COMMITTEE HEARING PRO-
18 CEDURE.—(a) The Legislative Reorganization Act of 1946
19 is amended—
20 (1) by striking out the third sentence of section
21 133(b);
22 (2) by striking out subsections (a), (b), and (f)
23 of section 133A;
24 (3) by adding after section 133B the following:

1 "OPEN SENATE COMMITTEE MEETINGS

2 "SEC. 133C. (a) Each meeting of each standing, select,
3 or special committee or subcommittee of the Senate, in-
4 cluding meetings to conduct hearings, shall be open to the
5 public: *Provided*, That a portion or portions of such meet-
6 ings may be closed to the public if the committee or sub-
7 committee, as the case may be, determines by vote of a
8 majority of the members of the committee present that the
9 matters to be discussed or the testimony to be taken at such
10 portion or portions—

11 "(1) will disclose matters necessary to be kept
12 secret in the interests of national security or the confiden-
13 tial conduct of the foreign relations of the United States;

14 "(2) will relate solely to matters of committee staff
15 personnel or internal staff management or procedure;

16 "(3) will tend to charge with crime or misconduct,
17 or to disgrace, injure the professional standing or other-
18 wise expose to public contempt or obloquy any indi-
19 vidual, or will represent a clearly unwarranted invasion
20 of the privacy of any individual: *Provided*, That this
21 subsection shall not apply to any government officer or
22 employee with respect to his official duties or employ-
23 ment: *And provided further*, That as applied to a wit-
24 ness at a meeting to conduct a hearing, this subsection

1 shall not apply unless the witness requests in writing
2 that the hearing be closed to the public;
3 "(4) will disclose the identity of any informer or
4 law enforcement agent or of any information relating
5 to the investigation or prosecution of a criminal offense
6 that is required to be kept secret in the interests of
7 effective law enforcement; or
8 "(5) will disclose information relating to the trade
9 secrets or financial or commercial information pertain-
10 ing specifically to a given person where—
11 "(A) the information has been obtained by the
12 Federal Government on a confidential basis other
13 than through an application by such person for
14 a specific government financial or other benefit;
15 and
16 "(B) Federal statute requires the information
17 to be kept confidential by Government officers and
18 employees; and
19 "(C) the information is required to be kept
20 secret in order to prevent undue injury to the com-
21 petitive position of such person.
22 A separate vote of the committee shall be taken with re-
23 spect to each committee or subcommittee meeting that is
24 closed to the public pursuant to this subsection, and the
25 committee shall make available within one day of such

1 meeting, a written explanation of its action. The vote of
2 each committee member participating in each such vote
3 shall be recorded and published and no proxies shall be
4 allowed.

5 "(b) Each standing, select, or special committee or sub-
6 committee of the Senate shall make public announcement of
7 the date, place, and subject matter of each meeting (whether
8 open or closed to the public) at least one week before such
9 meeting unless the committee or subcommittee determines by
10 a vote of the majority of its members that committee business
11 requires that such meeting be called at an earlier date, in
12 which case the committee shall make public announcement
13 of the date, place and subject matter of such meeting at the
14 earliest practicable opportunity.

15 "(c) A complete transcript, including a list of all per-
16 sons attending and their affiliation, shall be made of each
17 meeting of each standing, select, or special committee or sub-
18 committee (whether open or closed to the public). Except as
19 provided in subsection (d) of this section, a copy of each such
20 transcript shall be made available for public inspection within
21 seven days of each such meeting, and additional copies of any
22 transcript shall be furnished to any person at the actual cost
23 of duplication.

24 "(d) In the case of meetings closed to the public pur-
25 suant to subsection (a) of this section, the committee or sub-

1 committee may delete from the copies of transcripts that are
2 required to be made available or furnished to the public pur-
3 suant to subsection (c) of this section, those portions which
4 it determines by vote of the majority of the committee or
5 subcommittee consist of materials specified in paragraph
6 (1), (2), (3), (4), or (5) of subsection (a) of this sec-
7 tion. A separate vote of the committee or subcommittee shall
8 be taken with respect to each such transcript. The vote of
9 each committee or subcommittee member participating in
10 each such vote shall be recorded and published, and no
11 proxies shall be allowed. In place of each portion deleted
12 from copies of the transcript made available to the public,
13 the committee or subcommittee shall supply a written expla-
14 nation of why such portion was deleted, and a summary of the
15 substance of the deleted portion that does not itself disclose
16 information specified in paragraphs (1), (2), (3), (4),
17 (5) of subsection (a). The committee or subcommittee shall
18 maintain a complete copy of the transcript of each meeting
19 (including those portions deleted from copies made avail-
20 able to the public), for a period of at least one year after such
21 meeting.

22 "(e) A point of order may be raised in the Senate
23 against any committee vote to close a meeting to the public
24 pursuant to subsection (a) of this section, or against any
25 committee or subcommittee vote to delete from the publicly

1 available copy a portion of a meeting transcript pursuant
2 to subsection (d) of this section, by committee or subcom-
3 mittee members comprising one-fourth or more of the total
4 membership of the entire committee or subcommittee, as
5 the case may be. Any such point of order shall be raised
6 in the Senate within five legislative days after the vote
7 against which the point of order is raised, and such point
8 of order shall be a matter of highest personal privilege.
9 Each such point of order shall immediately be referred to
10 a Select Committee on Meetings consisting of the Presi-
11 dent pro tempore, the leader of the majority party, and
12 the leader of the minority party. The select committee
13 shall examine the complete verbatim transcript of the
14 meeting in question and shall rule whether the vote to close
15 the meeting was in accordance with subsection (a) of this
16 section, or whether the vote to delete a portion or portions
17 from publicly available copies of the meeting transcript
18 was in accordance with subsection (d) of this section, as the
19 case may be. The select committee should report to the
20 Senate within five calendar days (excluding days where
21 the Senate is not in session) a resolution containing its find-
22 ings. If the Senate adopts a resolution finding that the
23 committee vote in question was not in accordance with the
24 relevant subsection, it shall direct that there be made pub-
25 licly available the entire transcript of the meeting improp-

1 erly closed to the public or the portion or portions of any
2 meeting transcript improperly deleted from the publicly
3 available copy, as the case may be.
4 "(f) The Select Committee on Meetings shall not be
5 subject to the provisions of subsection (a), (b), (c), or (d)
6 of this section."
7 (b) Subsection (a) of subsection 242 of the Legislative
8 Reorganization Act of 1970 is repealed.
9 (c) Title I of the table of contents of the Legislative Re-
10 organization Act of 1946 is amended by inserting immedi-
11 ately below item 133B the following:

"133C. Open senate committee meetings.".

12 SEC. 102. Clause 27 (f) (2) of rule XI of the Rules of
13 the House of Representatives is amended to read as follows:
14 "(2) (A) Each meeting of each standing, select, or spe-
15 cial committee or subcommittee, including meetings to con-
16 duct hearings, shall be open to the public: *Provided,* That a
17 portion or portions of such meetings may be closed to the
18 public if the committee or subcommittee, as the case may be,
19 determines by vote of a majority of the members committee
20 or subcommittee present that the matters to be discussed or
21 the testimony to be taken at such portion or portions—
22 "(i) will probably disclose matters necessary to be
23 kept secret in the interests of national security or the con-

1 fidential conduct of the foreign relations of the United
2 States;
3 "(ii) will relate solely to matters of committee staff
4 personnel or internal staff management or procedure;
5 "(iii) will tend to charge with crime or misconduct,
6 or to disgrace, injure the professional standing or other-
7 wise expose to public contempt of obloquy any individ-
8 ual, or will represent a clearly unwarranted invasion of
9 the privacy of any individual: *Provided*, That this sub-
10 section shall not apply to any government or officer or
11 employee with respect to his official duties or employ-
12 ment: *And provided further*, That as applied to a wit-
13 ness at a meeting to conduct a hearing, this subsection
14 shall not apply unless the witness requests in writing
15 that the hearing be closed to the public;
16 "(iv) will probably disclose the identity of any in-
17 former or law enforcement agent or of any information
18 relating to the investigation or presecution of a criminal
19 offense that is required to be kept secret in the interests
20 of effective law enforcement; or
21 "(v) will disclose information relating to the trade
22 secrets of financial or commercial information pertain-
23 ing specifically to a given person where—
24 "(I) the information has been obtained by the

1 Federal Government on a confidential basis other
2 than through an application by such person for a
3 specific government financial or other benefit;
4 "(II) Federal statute requires the information
5 to be kept confidential by Government officers and
6 employees, and
7 "(III) the information is required to be kept
8 secret in order to prevent undue injury to the com-
9 petitive position of such persons.
10 A separate vote of the committee shall be taken with respect
11 to each committee or subcommittee meeting that is closed
12 to the public pursuant to this subsection, and the committee
13 shall make available within one day of such meeting, a
14 written explanation of its action. The vote of each commit-
15 tee member participating in each such vote shall be re-
16 corded and published and no proxies shall be allowed.
17 "(B) Each standing, select, or special committee or
18 subcommittee shall make public announcement of the date,
19 place, and subject matter of each meeting (whether open
20 or closed to the public) at least one week before such
21 meeting unless the committee or subcommittee determines
22 that committee business requires that such meeting be called
23 at an earlier date, in which case the committee shall make
24 public announcement of the date, place, and subject matter
25 of such meeting at the earliest practicable opportunity.

1 "(C) A complete transcript, including a list of all per-
2 sons attending and their affiliation, shall be made of each
3 meeting of each standing, select, or special committee or
4 subcommittee meeting (whether open or closed to the pub-
5 lic). Except as provided in paragraph (D), a copy of each
6 such transcript shall be made available for public inspection
7 within seven days of each such meeting, and additional copies
8 of any transcript shall be furnished to any person at the actual
9 cost of duplication.

10 "(D) In the case of meetings closed to the public pur-
11 suant to subparagraph (A), the committee or subcommittee
12 may delete from the copies of transcripts that are required
13 to be made available or furnished to the public pursuant to
14 subparagraph (C), portions which it determines by vote of
15 the majority of the committee or subcommittee consist
16 of material specified in clauses (i), (ii), (iii), (iv), or (v)
17 of subparagraph (A). A separate vote of the committee
18 or subcommittee shall be taken with respect to each tran-
19 script. The vote of each committee or subcommittee mem-
20 ber participating in each such vote shall be recorded and
21 published, and no proxies shall be allowed. In place of each
22 portion deleted from copies of the transcript made available
23 to the public, the committee shall supply a written ex-
24 planation of why such portion was deleted and a summary of
25 the substance of the deleted portion that does not itself dis-

1 close information specified in subsection (i), (ii), (iii),
2 (iv), or (v) of subsection (a). The committee or sub-
3 committee shall maintain a complete copy of the transcript of
4 each meeting (including those portions deleted from copies
5 made available to the public), for a period of at least one
6 year after such meetings.

7 "(E) A point of order may be raised against any com-
8 mittee or subcommittee vote to close a meeting to the public
9 pursuant to subparagraph (A), or against any committee
10 or subcommittee vote to delete from the publicly available
11 copy a portion of a meeting transcript and pursuant to sub-
12 paragraph (D), by committee or subcommittee members
13 comprising one-fourth or more of the total membership of
14 the entire committee or subcommittee. Any such point of
15 order must be raised before the entire House within five
16 legislative days after the vote against which the point of
17 order is raised, and such point of order shall be a matter of
18 highest privilege. Each such point of order shall immediately
19 be referred to a Select Committee on Meetings consisting
20 of the Speaker of the House of Representatives, the major-
21 ity leader, and the minority leader. The select committee
22 shall report to the House within five calendar days (exclud-
23 ing days where the House is not in session) a resolution
24 containing its findings. If the House adopts a resolution
25 finding that the committee vote in question was not in accord-

1 ance with the relevant subsection, it shall direct that there
2 be made publicly available the entire transcript of the meet-
3 ing improperly closed to the public or the portion or por-
4 tions of any meeting transcript improperly deleted from
5 the publicly available copy.

6 "(F) The Select Committee on Meetings shall not be
7 subject to the provisions of subparagraph (A), (B), (C),
8 or (D)."

9 SEC. 103. CONFERENCE COMMITTEES.—The Legisla-
10 tive Reorganization Act of 1946 is amended by inserting
11 after section 133(c), as added by section 101(3) of this
12 Act the following new section:

13 "OPEN CONFERENCE COMMITTEE MEETINGS

14 "SEC. 133D. (a) Each meeting of a committee of con-
15 ference shall be open to the public: *Provided,* That a portion
16 or portions of such meetings may be closed to the public if
17 the committee determines by vote of a majority of the mem-
18 bers of the committee present that the matters to be discussed
19 or the testimony to be taken at such portion or portions—

20 "(1) will disclose matters necessary to be kept secret
21 in the interests of national security or the confidential
22 conduct of the foreign relations of the United States;

23 "(2) will relate solely to matters of committee staff
24 personnel or internal staff management or procedure;

25 "(3) will tend to charge with crime or misconduct,

1 or to disgrace, injure the professional standing or other-
2 wise expose to public contempt or obloquy any individ-
3 ual, or will represent a clearly unwarranted invasion of
4 the privacy of any individual: *Provided*, That this sub-
5 section shall not apply to any government or officer or
6 employee with respect to his official duties or employ-
7 ment: *And, provided further*, That as applied to a wit-
8 ness at a meeting to conduct a hearing, this subsection
9 shall not apply unless the witness requests in writing that
10 the hearing be closed to the public;
11 "(4) will disclose the identity of any informer or
12 law enforcement agent or of any information relating to
13 the investigation or prosecution of a criminal offense
14 that is required to be kept secret in the interests of
15 effective law enforcement; or
16 "(5) will disclose information relating to the trade
17 secrets or financial or commercial information pertain-
18 ing specifically to a given person where—
19 "(A) the information has been obtained by the
20 Federal Government on a confidential basis other
21 than through an application by such person for a
22 specific government financial or other benefit;
23 "(B) Federal statute requires the information
24 to be kept confidential by Government officers and
25 employees; and

1 "(C) the information is required to be kept
2 secret in order to prevent undue injury to the com-
3 petitive position of such persons.
4 A separate vote of the committee shall be taken with respect
5 to each meeting that is closed to the public pursuant to this
6 subsection, and the committee shall make available within
7 one day of such meeting, a written explanation of its action.
8 The vote of each committee member participating in each
9 such vote shall be recorded and published and no proxies
10 shall be allowed.
11 "(b) Each committee of conference shall make public
12 announcement of the date, place, and subject matter of such
13 meeting at the earliest practicable opportunity.
14 "(c) A complete transcript, including a list of all per-
15 sons attending and their affiliation, shall be made of each
16 meeting of each committee of conference (whether open or
17 closed to the public). Except as provided in subsection (d)
18 of this section, a copy of each such transcript shall be made
19 available for public inspection within seven days of each such
20 meeting, and additional copies of any transcript shall be
21 furnished to any person at the actual cost of duplication.
22 "(d) In the case of meetings closed to the public pur-
23 suant to subsection (a) of this section, the committee of
24 conference may delete from the copies of transcripts that are
25 required to be made available or furnished to the public pur-

1 suant to subsection (c) of this section, those portions which
2 it determines by vote of the majority of the committee con-
3 sist of materials specified in paragraph (1), (2), (3), (4),
4 or (5) of subsection (a) of this section. A separate vote
5 of the committee shall be taken with respect to each such
6 transcript. The vote of each committee member participating
7 in each such vote shall be recorded and published, and no
8 proxies shall be allowed. In place of each portion deleted from
9 copies of the transcript made available to the public, the com-
10 mittee shall supply a written explanation of why such por-
11 tion was deleted, and a summary of the substance of the
12 deleted portion that does not itself disclose information speci-
13 fied in paragraph (1), (2), (3), (4), or (5) of subsection
14 (a) of this section. The committee shall maintain a complete
15 copy of the transcript of each meeting (including those por-
16 tions deleted from copies made available to the public), for
17 a period of at least one year after such meeting.

18 "(e) A point of order may be raised against any com-
19 mittee vote of a committee of conference to close a meeting
20 to the public pursuant to subsection (a) of this section or
21 any committee vote to delete from the publicly available
22 copy a portion of a meeting transcript pursuant to subsec-
23 tion (d) of this section by committee members comprising
24 one-fourth or more of the total membership of the entire
25 committee. Any such point of order shall be raised in

1 either House within five legislative days after the vote
2 against which the point of order is raised, and such point
3 of order shall be a matter of highest personal privilege. Each
4 such point of order shall immediately be referred to a Select
5 Conference Committee on Meetings consisting of the Presi-
6 dent pro tempore of the Senate, the Speaker of the House
7 of Representatives, and the majority and minority leaders
8 from each House. The select committee shall examine the
9 complete verbatim transcript of the meeting in question
10 and shall rule whether the vote to close the meeting was
11 in accordance with subsection (a) of this section or whether
12 the vote to delete a portion or portions from publicly avail-
13 able copies of the meeting transcript was in accordance with
14 subsection (d) of this section, as the case may be. The
15 select committee reports to both Houses a concurrent re-
16 solution within five calendar days (excluding days where
17 either House is not in session) a resolution containing its
18 findings. If both Houses adopt such a resolution finding
19 that the committee vote in question was not in accordance
20 with the relevant subsection, they shall direct that there be
21 made publicly available the entire transcript of the meeting
22 improperly closed to the public or the portion or portions
23 of any meeting transcript improperly deleted from the pub-
24 licly available copy, as the case may be.
25 "(f) The Select Conference Committee on Meetings

1 shall not be subject to the provisions of subsection (a), (b),
2 (c), or (d) of this section."
3 (b) Title I of the table of contents of the Legislative Re-
4 organization Act of 1946 is amended by inserting immedi-
5 ately below item 133C, as added by section 101 (c) of this
6 Act, the following:

"133D. Open conference committee meetings.".

7 TITLE II—AGENCY PROCEDURES

8 SEC. 201. (a) This section applies, according to the
9 provisions thereof, to any agency, as defined in section
10 551 (1) of title 5, United States Code, where the body com-
11 prising the agency consists of two or more members. Except
12 as provided in subsection (b), all meetings (including meet-
13 ings to conduct hearings) of such agencies at which official
14 action is considered or discussed shall be open to the public.
15 (b) Subsection (a) shall not apply to any portion or
16 portions of an agency meeting where the agency determines
17 by vote of a majority of its entire membership—
18 (1) will probably disclose matters necessary to be
19 kept secret in the interests of national security or the
20 confidential conduct of the foreign relations of the United
21 States;
22 (2) will relate solely to individual agency personnel
23 or to internal agency office management and procedures
24 or financial auditing;

1 (3) will tend to charge with crime or misconduct,
2 or to disgrace, injure the professional standing or other-
3 wise expose to public contempt of obloquy any individ-
4 ual, or will represent a clearly unwarranted invasion of
5 the privacy of any individual: *Provided*, That this sub-
6 section shall not apply to any government or officer or
7 employee with respect to his official duties or employ-
8 ment: *And provided further*, That as applied to a wit-
9 ness at a meeting to conduct a hearing, this subsection
10 shall not apply unless the witness requests in writing that
11 the hearing be closed to the public;
12 (4) will probably disclose the identity of any in-
13 former or law enforcement agent or of any information
14 relating to the investigation or prosecution of a criminal
15 offense that is required to be kept secret in the interests
16 of effective law enforcement;
17 (5) will disclose information relating to the trade
18 secrets or financial or commercial information pertaining
19 specifically to a given person where—
20 (A) the information has been obtained by the
21 Federal Government on a confidential basis other
22 than through an application by such person for a
23 specific government financial or other benefit; and
24 (B) Federal statute requires the information to

1 be kept confidential by government officers and em-
2 ployees, and
3 (C) the information is required to be kept secret
4 in order to prevent undue injury to the competitive
5 position of such persons;
6 (6) will relate to the conduct or disposition (but
7 not the initiation of a case of adjudication governed by
8 the provisions of the first paragraph of section 554 (a)
9 of title 5, United States Code, or of subsection (1),
10 (2), (4), (5), or (6) thereof.
11 A separate vote of the agency members shall be taken with
12 respect to each agency meeting that is closed to the public
13 pursuant to this subsection. The vote of each agency mem-
14 ber participating in such vote shall be recorded and published
15 and no proxies shall be allowed. In the case of any closing of
16 portions of a meeting to the public pursuant to this subsection,
17 the agency shall promptly publish an explanation of its
18 action.
19 (c) Each agency shall make public announcement of
20 the date, place, and subject matter of each meeting at which
21 official action is considered or discussed (whether open or
22 closed to the public) at least one week before each meeting
23 unless the agency determines by a vote of the majority of
24 its members that agency business requires that such meetings
25 be called at an earlier date, in which case the agency shall

1 make public announcement of the date, place, and sub-
2 ject matter of such meeting at the earliest practicable
3 opportunity.

4 (d) A complete transcript, including a list of all per-
5 sons attending and their affiliations, shall be made of each
6 meeting of each agency at which official action is considered
7 or discussed (whether open or closed to the public). Ex-
8 cept as provided in subsection (e) of this section a copy of
9 each such meeting shall be made available to the public
10 for inspection, and additional copies of any transcript shall
11 be furnished to any person at the actual cost of duplication.

12 (e) In the case of meetings closed to the public pur-
13 suant to subsection (b) of this section, the agency may delete
14 from the copies of transcripts made available or furnished to
15 the public pursuant to subsection (d) of this section those
16 portions, which the agency determines by vote of a majority
17 of its membership consists of materials specified in paragraph
18 (1), (2), (3), (4), or (5) of subsection (b) of this
19 section. A separate vote of the agency shall be taken with
20 respect to each transcript. The vote of each agency mem-
21 ber participating in such vote shall be recorded and pub-
22 lished, and no proxies shall be allowed. In place of each
23 portion deleted from copies of the meeting transcript made
24 available to the public, the agency shall supply a written
25 explanation of why such portion was deleted and a summary

1 of the substance of the deleted portion that does not itself
2 disclose information specified in paragraph (1), (2), (3),
3 (4), or (5) of subsection (a). The agency shall maintain
4 a complete verbatim copy of the transcript of each meeting
5 (including those portions deleted from copies made available
6 to the public) for a period of at least two years after such
7 meeting.

8 (f) Each agency subject to the requirements of this
9 section shall, within one hundred and eighty days after the
10 enactment of this Act, following published notice in the
11 Federal Register of at least thirty days and opportunity
12 for written comment by interested persons, promulgate regu-
13 lations to implement the requirements of subsections (a)
14 through (e) inclusive of this section. Any citizen or person
15 resident in the United States may bring a proceeding in
16 the United States Court of Appeals for the District of Co-
17 lumbia Circuit—

18 (1) to require an agency to promulgate such regu-
19 lations if such agency has not promulgated such regu-
20 lations within the time period specified herein; or

21 (2) to set aside agency regulations issued pursu-
22 ant to this subsection that are not in accord with the
23 requirements of subsections (a) through (e) of this
24 section inclusive, and to require the promulgation of
25 regulations that are in accord with such subsections.

1 (g) The district courts of the United States shall have
2 jurisdiction to enforce the requirements of subsections (a)
3 through (e) inclusive of this section by declaratory judg-
4 ment, injunctive relief, or otherwise. Such actions may
5 be brought by any citizen or person resident in the United
6 States. Such actions shall be brought in the district wherein
7 the plaintiff resides, or has his principal place of business,
8 or where the agency in question has its headquarters. In
9 deciding such cases the court may examine any portion of
10 a meeting transcript that was deleted from the publicly
11 available copy. Among other forms of equitable relief, the
12 court may require that any portion of a meeting transcript
13 improperly deleted from the publicly available copy be made
14 publicly available for inspection and copying, and, having
15 due regard for orderly administration and the public interest,
16 may set aside any agency action taken or discussed at an
17 agency meeting improperly closed to the public.
18 (h) In any action brought pursuant to subsection (f)
19 or (g) of this section, costs of litigation (including reason-
20 able attorney's and expert witness fees) may be apportioned
21 to the original parties or their successors in interest when-
22 ever the court determines such award is appropriate.
23 (i) The agencies subject to the requirements of this
24 section shall annually report to Congress regarding their
25 compliance with such requirements, including a tabulation

1 of the total number of agency meetings open to the public,
2 the total number of meetings closed to the public, the reasons
3 for closing such meetings, and a description of any litigation
4 brought against the agency under this section.

5 SEC. 202. (a) Title 5 of the United States Code is
6 amended by adding after section 557 the following:

7 "EX PARTE COMMUNICATIONS IN AGENCY PROCEEDING

8 "SEC. 557. (a) This section applies, according to the
9 provisions thereof, to the following proceedings:

10 "(1) any proceeding to which section 557 (a) of
11 this title applies;

12 "(2) any rulemaking proceeding with respect to
13 which an agency is required by section 553 of this title
14 to afford public notice and opportunity for participation
15 by interested persons: *Provided,* That for purposes of
16 this section the exemption from such requirements in
17 section 553 (a) (2) of matters relating to public prop-
18 erty, loans, grants, benefits, or contracts shall not be
19 effective; or

20 "(3) any proceeding to prepare an environmental
21 impact statement required by section 102 (2) (c) of
22 the National Environmental Policy Act.

23 "(b) In any agency proceeding which is subject to
24 subsection (a) of this section, except to the extent required

1 for the disposition of ex parte matters as authorized by
2 law—
3 "(1) no interested person (including members or
4 employees of other government agencies) shall make or
5 cause to be made to any member of the agency in ques-
6 tion, hearing examiner, or employee who is or may be
7 involved in the decisional process of said proceeding, an
8 ex parte communication relevant to the events of the
9 proceeding;
10 "(2) no member of the agency in question, hearing
11 examiner, or employee who is or may be involved in the
12 decisional process of such proceeding, shall make or
13 cause to be made to an interested person an ex parte
14 communication relevant to the merits of the proceeding;
15 "(3) a member of the agency in question, hearing
16 examiner, or employee who is or may be involved in the
17 decisional process of said proceeding, who receives a
18 communication in violation of this subsection shall place
19 in the public record of the proceeding—
20 "(A) written material submitted in violation of
21 this subsection; or
22 "(B) memorandums stating the substance of
23 all oral communications submitted in violation of
24 this subsection; or

1 "(C) responses to the materials described in
2 subparagraphs (A) and (B) of this subsection;
3 "(4) upon receipt of a communication in violation
4 of this subsection from a party to any proceeding to
5 which this section applies, the hearing examiner or em-
6 ployee presiding at the hearings may, to the extent
7 consistent with the interests of justice and the policy
8 of the underlying statutes, require the persons or party to
9 show cause why his claim or interest in the proceeding
10 should not be discussed, denied, disregarded, or other-
11 wise adversely affected by virtue of such violation; and
12 "(5) the prohibitions of this subsection shall apply
13 at such time as the agency shall designate, having due
14 regard for the public interest in open decisionmaking
15 by agencies, but in no case shall they apply later than
16 the time at which a proceeding is noticed for hearing
17 or opportunity for participation by interested persons
18 unless the person is responsible for the communication
19 has knowledge that it will be noticed, in which case
20 said prohibition shall apply at the time of his acquisition
21 of such knowledge.
22 "(c) Each agency subject to the requirements of this
23 section shall, within one hundred and eighty days after the
24 enactment of this section, following published notice in
25 the Federal Register of at least thirty days and opportu-

1 nity for written comment by interested persons, promul-
2 gate regulations to implement the requirements of subsection
3 (b) of this section. Any citizen or person resident in the
4 United States may bring a proceeding in the United States
5 Court of Appeals for the District of Columbia Circuit—
6 "(1) to require any agency to promulgate such
7 regulations if such agency has not promulgated such
8 regulations within the time period specified herein;
9 "(2) to set aside agency regulations issued pursuant
10 to this subsection that are not in accord with the require-
11 ments of subsection (b) of this section; and to require
12 the promulgation of regulations that are in accord with
13 such subsection.
14 "(d) The district courts of the United States shall have
15 jurisdiction to enforce the requirements of subsection (b) of
16 this section by declaratory judgment, injunctive relief, or
17 otherwise. Such action may be brought by any citizen of or
18 person resident in the United States. Such actions shall be
19 brought in the district wherein the plaintiff resides or has his
20 principal place of business or where the agency in question
21 has its headquarters. Where a person other than an agency,
22 agency member, hearing examiner, or employee is alleged
23 to have participated in a violation of the requirements of sub-
24 section (b) of this section such person may, but need not
25 be joined with the agency as a party defendant; for purposes

1 of joining such person as a party defendant, service may be
2 had on such person in any district. Among other forms of
3 equitable relief, the court may require that any ex parte com-
4 munication made or received in violation of the requirements
5 of subsection (b) of this section be published, and, having
6 due regard for orderly administration and the public interest,
7 may set aside any agency action taken in a proceeding with
8 respect to which the violation occurred.

9 "(e) In any action brought pursuant to subsection (c)
10 or (d) of this subsection, cost of litigation (including
11 reasonable attorney's and expert witness fees) may be ap-
12 portioned to the original parties or their successors in interest
13 whenever the court determines such award is appropriate."

14 SEC. 203. This title and the amendments made by this
15 title do not authorize withholding of information or limit the
16 availability of records to the public except as provided in this
17 title. This title is not to be construed as authority to withhold
18 information from Congress.

Exhibit 2

Section-by-Section Analyses of the Federal "Government in the Sunshine Act"

Section 1: Provides that the Act may be cited as the "Government in the Sunshine Act."

Section 2: Declares it to be the policy of the United States that the public is entitled to the fullest practicable disclosure concerning the decision making processes of the Federal government.

Section 3: Defines the terms "national security" and "person" for purposes of the Act.

Title 1: Concerns the hearing and meeting procedures of congressional committees

Section 101: Amend the Legislative Reorganization Act of 1946 as applicable to the Senate to establish a basic norm of open meetings by all committees unless a majority of the committee determines on a recorded vote that the matters to be considered or discussed at the meeting will fall within the following narrowly defined exemptions:

National security or confidential conduct of foreign relations;

Internal committee staff personnel or management matters;

Defamation of an individual other than a government officer or employee with respect to his employment (except that in the case of a witness at a hearing, the hearing can be closed only if he requests that it be closed):

The identity of informers or enforcement agents or similar sensitive information vital to law enforcement;

Information relating to trade secrets or financial information that has been obtained by the Federal government on a confidential basis; information required to be kept secret by federal statute; and information the disclosure of which would injure a person's competitive position.

This section would rather provide that committees must normally give 7 days public notice of all meetings; that a complete transcript of each meeting should be prepared and made available to the public for inspection and copying; there may be deleted from the publicly available version of the transcript portions which the committee determines fall within the exemptions specified above.

This section further provides that a point of order against a committee vote to close a hearing or delete a portion from the transcript available to the public may be raised by ¼ of the members of the committee present. The point of order would be a matter of highest privilege and would be referred to a Select Committee on Meetings, consisting of the President Pro Tempore and the majority and minority leaders. Their findings as to whether the secrecy was justified or not would be subject to vote of the entire Senate. If it were determined that a meeting or portion thereof had been improperly kept secret, the transcript of the meeting or portion would be made publicly available.

Section 102: Would impose identical requirements concerning open meetings on House committees. The Select Committee on Meetings would consist of the Speaker and the majority and minority leaders.

Section 103: Would impose the same open meeting requirements on conference committees. A Select Conference Committee on Meetings consisting of the Speaker, the President Pro Tempore, and the majority and minority leaders from each House would initially rule on points of order raised against closed meetings or delections from the publicly available transcript of a meeting.

Section 104: Provide that no court would have jurisdiction to review any of the votes or rulings pursuant to the above requirements unless a person's constitutional rights were infringed.

Title 2: Concerns the decision making process of the administrative agencies in the Federal government.

Section 201: Provides that meetings of all multi-member federal agencies at which official action is considered or discussed must normally be open to the public. Such meetings could be closed to the public only if the agency determines by a majority of its entire membership that the matters to be discussed fall within one of the specific exemptions applicable in the case of Congressional committee meetings; or that the meeting would deal with a case of adjudication where the agency is acting in an essentially judicial capacity. The agency would normally be required to give 7 days public notice of all meetings, to make a complete transcript of all meetings, and to make available to the public for inspection and copying the transcript of each meeting. Portions of the meeting transcript consisting of confidential matters falling within the exemptions specified above could be deleted from the copy made available to the public.

In addition, each agency subject to the above requirements would be required to publish implementing regulations and annually report to Congress on their compliance with the open meeting requirements. The section would further provide that any person could bring a court action to challenge the agency's implementing regulations or its decision in a particular instance to close a meeting or delete material from the publicly available transcript. The court would in such suits require that matters improperly kept secret be publicly disclosed, and could in its discretion set aside agency action taken or discussed at meetings improperly kept secret and also award attorney's fee to either party to the lawsuit.

Section 202: Would apply to all federal administrative agencies with respect to the following types of proceedings:

Any case of agency adjudication or rule making on the record which under the Administrative Procedure Act is subject to a requirement of trial-type procedures;

Any agency rule making proceedings with respect to which the agency is required by the Administrative Procedure Act to afford public notice and opportunity for comment by interested persons;

Any proceeding to prepare an environmental impact statement required under the National Environmental Policy Act.

The section deals with any ex parte (outside) communications between an interested person and a member or employee of the agency in such proceedings, and the agency would be required to publish any such ex parte communications on the public record. The prohibition against ex parte communications would become effective at such time as the agency might designate, but in no event later than the time the proceeding in question was publicly noticed or the time that a party to the communication became aware that the proceeding would be so noticed.

Each agency subject to the requirements of the section would be required to promulgate implementing regulations.

Any person could bring a court action to review the implementing regulations or any alleged improper ex parte communication. The court could require that any improper ex parte communication be made public, and could use its discretion to set aside agency action taken in a proceeding with respect to which the improper communication occurred, and to award attorney's fees to either party.

Section 203: Provides that the provisions of Title 2 do not authorize withholding of information from the public and are not authority to withhold information from Congress.

The redrafted version of the Federal "Government in the Sunshine Act," while somewhat more lengthly than the first version, S. 3881, retains its essential purposes. The various exemptions from the open meeting requirement for congressional committees and multi-member administrative agencies have been made more specific. In addition, congressional committees and administrative agencies are required to keep transcripts of all meetings and make such transcripts publicly available except for confidential portions falling within one of the specific exemptions.

In the case of meetings by congressional committees, the redrafted version of the Act provides an enforcement mechanism for cases where a meeting is claimed to have been improperly closed. One fourth of the members of a committee can challenge the closing of a meeting by raising a point of order which must promptly be referred to a Select Committee on Meetings, consisting of the legislative leadership, for a ruling. The committees' ruling would be subject to the vote of the entire body.

The redrafted version of the Act also applies the open meeting requirement to conference committees.

As applied to administrative agencies, the open meeting requirement could be enforced by any person in a court action.

The redrafted version of the Act also contains an additional requirement, applicable to all federal agencies, that would prohibit all ex parte communications in cases of rule making or adjudication by the agency or the proceedings to prepare an Environmental Impact statement pursuant to the National Environmental Policy Act. This requirement, which could be enforced by court action by any person, would further advance the goal of open government decision making by prohibiting off the record pressures on agencies by interested outside parties.

Mr. ROTH. Mr. President, I am very pleased to join the junior Senator from Florida in cosponsoring the "Government in the Sunshine Act." Senator Chiles is doing this country a fine public service in offering this legislation for consideration and debate.

I want to point out that this effort is entirely complementary with the resolution that Senator Humphrey and I will introduce later this week to create a new Senate rule requiring committee meetings be open to the public except when a majority of the committee vote to close the meeting for national security reasons or because the reputation of an individual is involved. I feel that if we first put our own House in order, we will be in a much better position to press for the more general antisecrecy legislation embodied in the "Government in the Sunshine Act."

I am cosponsoring "Government in the Sunshine Act," not because it represents the whole response to the problem of governmental secrecy, but because it is important to have hearings on a range of different kinds of legislation dealing with both executive and legislative secrecy and with the processes of Government as well as Government documents.

I am looking forward to participating with Senator Chiles and with our other colleagues on the Committee on Government Operations in studying and debating this antisecrecy legislation, I certainly hope that our committee work on this legislation will be "in the sunshine."

Mr. STAFFORD. Mr. President, I am pleased to be included as one of the original cosponsors of the legislation that has been introduced by the Senator from Florida (Mr. Chiles). For some time I have been concerned over the growing evidence of declining public confidence in Government, politicians, and politics.

I think one of the major reasons the public is suspicious about Government and politics, particularly at the national level, is that so much of our activity takes place away from public view. For that reason, I am pleased to join as a sponsor of legislation that would require all meetings of Federal agencies and congressional committees be open to the public, with only certain limited exceptions. This measure would permit the public to assume its rightful role as a full working partner in the operations of its Government.

Too much of our activity is carried on in shadows that block the view of the public, but which build the suspicion of the public. I think we should eliminate those shadows with the bright light of public disclosure.

I intend, later in this session, to reintroduce the Open Government Act, which would require full and complete financial disclosure of all lobbying activities related to the Congress. And, I hope to have the opportunity to give my support once again to legislation that would require full and public disclosure of the financial status of Members of Congress and their senior staff members.

Each of these measures is designed to open up Government and politics to public view and I am delighted that the Senator from Florida, Mr. Chiles, is pressing ahead with his legislation.

[From the Congressional Record—Senate, Jan. 15, 1975]

(S 59–S 64)

Introduction of S. 5 by Senator Lawton Chiles

S. 5. A bill to provide that meetings of Government agencies and of congressional committees shall be open to the public, and for other purposes. Referred to the Committee on Government Operations.

Mr. Chiles. Mr. President, in January 1973, I introduced S. 260, the Federal Government in the Sunshine Act. The purpose of this bill is to provide for more public access to the work of the legislative and executive branches of Government by making most meetings of congressional committees and Federal agencies open to all interested persons.

Since the introduction of the bill, we have had a conference cosponsored by Common Cause and two rounds of hearings at which a number of agency officials and Members of Congress testified. After each discussion on the bill, we considered the many thoughtful suggestions and made revisions to reflect the most discerning of them.

The bill that I am reintroducing today as S. 5, is, therefore, a much more refined bill, a bill which has been carefully examined by many of the people who will be affected by its passage.

Support for the bill within the Senate has been encouraging. The concept of opening up congressional markup sessions and conferences has been overwhelmingly accepted by the Democratic conference. Last Congress, we had 26 cosponsors for the bill. This Congress we hope to have even more.

Secrecy in Government has become synonymous, in the public's mind, with deception by the Government. While some matters must be discussed in closed session, these are few and are specifically provided for in the bill, to insure that the bill itself will not become a shield behind which Government can hide its deliberations from the people.

The experience we have had with open meetings in the 93d session shows that committees can work as effectively or more effectively in the public. For the past 2 years the Government Operations Committee, the Banking, Housing, and Urban Affairs Committee, and the Interior Committee have held open markup sessions. They have dealt effectively and openly with such important, and often controversial, legislation as the Congressional Budget and Impoundment Control Act of 1973, the Energy Reorganization Act of 1973, Federal Regulation of Lobbying Amendments, the Housing and Community Development Act of 1974, control of export-import banking, energy allocation, land use policy, Executive privilege, consumer protection, surface mining, and mineral leasing.

I hope that the Senate will act on the bill this Congress. With the public so keenly aware these days of the things that can go wrong in the governmental decisionmaking process, it is incumbent upon the Senate to show them that we are willing to eliminate the practices which foster wrong decisions.

Mr. President, I ask for unanimous consent to have the bill printed in full at this point in the record.

There being no objection, the bill was ordered to be printed in the record, as follows:

94TH CONGRESS
1ST SESSION

S. 5

IN THE SENATE OF THE UNITED STATES

JANUARY 15, 1975

Mr. CHILES (for himself, Mr. BAYH, Mr. BEALL, Mr. BIDEN, Mr. BROCK, Mr. CLARK, Mr. CRANSTON, Mr. GARY W. HART, Mr. PHILIP A. HART, Mr. HASKELL, Mr. HATFIELD, Mr. HATHAWAY, Mr. HUMPHREY, Mr. MCGOVERN, Mr. MATHIAS, Mr. METCALF, Mr. MONDALE, Mr. NELSON, Mr. PACKWOOD, Mr. PERCY, Mr. PROXMIRE, Mr. ROTH, Mr. STAFFORD, Mr. STONE, and Mr. WEICKER) introduced the following bill; which was read twice and referred to the Committee on Government Operations

A BILL

To provide that meetings of Government agencies and of congressional committees shall be open to the public, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 SECTION 1. SHORT TITLE.—This Act may be cited as
4 the "Government in the Sunshine Act".
5 SEC. 2. DECLARATION OF POLICY.—It is hereby de-
6 clared to be the policy of the United States that the public
7 is entitled to the fullest practicable information regarding
8 the decisionmaking processes of the Federal Government.
9 SEC. 3. DEFINITIONS.—For purposes of this Act—
10 (1) "National defense" means—

1 (A) the protection of the United States and its
2 military forces against actual or potential military
3 attack by a foreign power;
4 (B) the obtaining of foreign intelligence informa-
5 tion deemed essential to the military defense of the
6 United States or its forces;
7 (C) the protection of information essential to the
8 military defense of the United States or its forces against
9 foreign intelligence activities; or
10 (D) the protection, to the extent specifically found
11 necessary by the President in writing, of the United
12 States against overthrow of the Government by force;
13 and
14 (2) "Person" includes an individual, partnership, cor-
15 poration, associated governmental authority, or public or
16 private organization.

17 TITLE I—CONGRESSIONAL PROCEDURES

18 SEC. 101. SENATE COMMITTEE HEARING PRO-
19 CEDURE.—(a) The Legislative Reorganization Act of 1946
20 is amended—
21 (1) by striking out the third sentence of section
22 133(b);
23 (2) by striking out subsections (a), (b), and (f)
24 of section 133A;
25 (3) by adding after section 133B the following:

1 "OPEN SENATE COMMITTEE MEETINGS

2 "SEC. 133C. (a) Each meeting of each standing, select,
3 or special committee of the Senate, or subcommittee thereof,
4 including meetings to conduct hearings, shall be open to the
5 public: *Provided,* That a portion or portions of such meet-
6 ings may be closed to the public if the committee or subcom-
7 mittee, as the case may be, determines by a vote of a majority
8 of a quorum of the committee or subcommittee present that
9 the matters to be discussed or the testimony to be taken at
10 such portion or portions—

11 "(1) will disclose matters necessary to be kept
12 secret in the interests of national defense or the neces-
13 sarily confidential conduct of the foreign policy of the
14 United States;

15 "(2) will relate solely to matters of committee staff
16 personnel or internal staff management or administra-
17 tion;

18 "(3) will tend to charge with crime or misconduct,
19 or to disgrace any person, or will represent a clearly
20 unwarranted invasion of the privacy of any individual:
21 *Provided,* That this paragraph shall not apply to any
22 Government officer or employee with respect to his of-
23 ficial duties or employment: *And provided further,* That
24 as applied to a witness at a meeting, this paragraph

1 shall not apply unless the witness requests in writing that
2 the hearing be closed to the public;
3 "(4) will disclose information pertaining to any in-
4 vestigation conducted for law enforcement purposes, but
5 only to the extent that the disclosure would (A) inter-
6 fere with enforcement proceedings, (B) deprive a per-
7 son of a right to a fair trial or an impartial adjudication,
8 (C) disclose the identity of a confidential source and,
9 in the case of a record compiled by a criminal law en-
10 forcement authority in the course of a criminal investi-
11 gation, or by an agency conducting a lawful national
12 security intelligence investigation, confidential informa-
13 tion furnished only by the confidential source, (D) dis-
14 close investigative techniques and procedures, or (E)
15 endanger the life or physical safety of law enforcement
16 personnel; or
17 "(5) will disclose information relating to the trade
18 secrets or financial or commercial information pertaining
19 specifically to a given person where—
20 "(A) a Federal statute requires the informa-
21 tion to be kept confidential by Government officers
22 and employees; or
23 "(B) the information has been obtained by the
24 Federal Government on a confidential basis other
25 than through an application by such person for a

1 specific Government financial or other benefit, and
2 the information must be kept secret in order to pre-
3 vent grave and irreparable injury to the competitive
4 position of such person.
5 A separate vote of the committee shall be taken with respect
6 to each committee or subcommittee meeting a portion or por-
7 tions of which are proposed to be closed to the public pur-
8 suant to this subsection. The vote of each committee member
9 participating in each such vote shall be recorded and no
10 proxies shall be allowed. Within one day of such vote, the
11 committee shall make publicly available a written copy of
12 such vote and, if a meeting or portion thereof is closed to the
13 public, a full written explanation of its action.
14 "(b) Each standing, select, or special committee of the
15 Senate, or subcommittee thereof, shall make public announce-
16 ment of the date, place, and subject matter of each meeting
17 at least one week before such meeting unless the committee
18 or subcommittee determines by a vote of a majority of a
19 quorum of the committee or subcommittee present that com-
20 mittee business requires that such meeting be called at an
21 earlier date, in which case the committee shall make public
22 announcement of the date, place, and subject matter of such
23 meeting at the earliest practicable opportunity.
24 "(c) A complete transcript shall be made of each meet-
25 ing of each standing, select, or special committee or subcom-

1 mittee (whether open or closed to the public). Except as
2 provided in subsection (d) of this section, a copy of each
3 such transcript shall be made available for public inspection
4 within seven days of each such meeting, and additional copies
5 of any transcript shall be furnished to any person at the actual
6 cost of duplication. Notwithstanding the provisions of sub-
7 section (d), in the case of meetings closed to the public, the
8 portion of such transcript made available for public inspection
9 shall include a list of all persons attending and their affilia-
10 tion, except for any portion of such list which would disclose
11 the identity of a confidential source, or endanger the life
12 or physical safety of law enforcement personnel.

13 "(d) In the case of meetings closed to the public pur-
14 suant to subsection (a) of this section, the committee or sub-
15 committee may delete from the copies of transcripts that are
16 required to be made available or furnished to the public pur-
17 suant to subsection (c) of this section, those portions which
18 it determines by vote of the majority of a quorum of the
19 committee or subcommittee consist of materials specified in
20 paragraph (1), (2), (3), (4), or (5) of subsection (a)
21 of this section. A separate vote of the committee or sub-
22 committee shall be taken with respect to the transcript of
23 each such meeting. The vote of each committee or subcom-
24 mittee member participating in each such vote shall be
25 recorded and published and no proxies shall be allowed. In

1 place of each portion deleted from copies of the transcript
2 made available to the public, the committee or subcommittee
3 shall supply a full written explanation of why such portion
4 was deleted, and a summary of the substance of the deleted
5 portion that does not itself disclose information specified in
6 paragraph (1), (2), (3), (4), or (5) of subsection (a).
7 The committee or subcommittee shall maintain a complete
8 copy of the transcript of each meeting (including those por-
9 tions deleted from copies made available to the public), for
10 a period of at least one year after such meeting, or until
11 the Congress following the one in which such meeting was
12 held is assembled, whichever occurs later.

13 "(e) A point of order may be raised in the Senate
14 against any committee or subcommittee vote to close a meet-
15 ing to the public pursuant to subsection (a) of this section,
16 or against any committee or subcommittee vote to delete
17 from the publicly available copy a portion of a meeting tran-
18 script pursuant to subsection (d) of this section, by com-
19 mittee or subcommittee members comprising one-fourth or
20 more of the total number of members of such committee or
21 subcommittee present and voting for or against such action.
22 Any such point of order shall be raised in the Senate within
23 two calendar days after the vote against which the point
24 of order is raised, and such point of order shall be a
25 matter of highest personal privilege. Each such point of

1 order shall immediately be referred to a Select Committee
2 on Meetings consisting of the President pro tempore, the
3 leader of the majority party, and the leader of the minority
4 party. The select committee shall examine the complete
5 verbatim transcript of the meeting in question and shall rule
6 whether the vote to close the meeting was in accordance
7 with subsection (a) of this section, or whether the vote to
8 delete a portion or portions from publicly available copies
9 of the meeting transcript was in accordance with subsection
10 (d) of this section, as the case may be. The select committee
11 shall report to the Senate within five calendar days (ex-
12 cluding days where the Senate is not in session) a resolu-
13 tion containing its findings. If the Senate adopts a resolution
14 finding that the committee vote in question was not in
15 accordance with the relevant subsection, it shall direct that
16 there be made publicly available the entire transcript of
17 the meeting improperly closed to the public or the portion
18 or portions of any meeting transcript improperly deleted
19 from the publicly available copy, as the case may be.
20 "(f) The Select Committee on Meetings shall not be
21 subject to the provisions of subsection (a), (b), (c), or
22 (d) of this section."
23 (b) Subsection (a) of subsection 242 of the Legislative
24 Reorganization Act of 1970 is repealed.

80-459 O - 77 - 8

1 (c) Paragraph 7 (b) of Rule XXV of the Standing
2 Rules of the Senate is repealed.
3 (d) Title I of the table of contents of the Legislative
4 Reorganization Act of 1946 is amended by inserting imme-
5 diately below item 133B the following:

"133C. Open Senate committee meetings.".

6 SEC. 102. Clause 27 (f) (2) of Rule XI of the Rules of
7 the House of Representatives is amended to read as follows:
8 "(2) (A) Each meeting of each standing, select, or
9 special committee or subcommittee, including meetings to
10 conduct hearings, shall be open to the public: *Provided*, That
11 a portion or portions of such meetings may be closed to the
12 public if the committee or subcommittee, as the case may be,
13 determines by vote of a majority of a quorum of the com-
14 mittee or subcommittee present that the matters to be dis-
15 cussed or the testimony to be taken at such portion or
16 portions—
17 "(i) will disclose matters necessary to be kept
18 secret in the interests of national defense or the neces-
19 sarily confidential conduct of the foreign policy of the
20 United States;
21 "(ii) will relate solely to matters of committee staff
22 personnel or internal staff management or administra-
23 tion;

1 "(iii) will tend to charge with crime or misconduct,
2 or to disgrace any person, or will represent a clearly
3 unwarranted invasion of the privacy of any individual:
4 *Provided*, That this paragraph shall not apply to any
5 Government officer or employee with respect to his offi-
6 cial duties or employment: *And provided further*, That
7 as applied to a witness at a meeting, this paragraph shall
8 not apply unless the witness requests in writing that the
9 hearing be closed to the public;
10 "(iv) will disclose information pertaining to any
11 investigation conducted for law enforcement purposes,
12 but only to the extent that the disclosure would (A)
13 interfere with enforcement proceedings, (B) deprive
14 a person of a right to a fair trial or an impartial adjudica-
15 tion, (C) disclose the identity of a confidential source
16 and, in the case of a record compiled by a criminal law
17 enforcement authority in the course of a criminal investi-
18 gation, or by an agency conducting a lawful national
19 security intelligence investigation, confidential informa-
20 tion furnished only by the confidential source, (D) dis-
21 close investigative techniques and procedures, or (E)
22 endanger the life or physical safety of law enforcement
23 personnel; or
24 "(v) will disclose information relating to the trade

1 secrets or financial or commercial information pertain-
2 ing specifically to a given person where—
3 "(I) a Federal statute requires the information
4 to be kept confidential by Government officers and
5 employees; or
6 "(II) the information has been obtained by the
7 Federal Government on a confidential basis other
8 than through an application by such person for a
9 specific Government financial or other benefit, and
10 the information must be kept secret in order to
11 prevent grave and irreparable injury to the competi-
12 tive position of such person.
13 A separate vote of the committee shall be taken with respect
14 to each committee or subcommittee meeting a portion or por-
15 tions of which are proposed to be closed to the public pur-
16 suant to this subsection. The vote of each committee member
17 participating in each such vote shall be recorded and no
18 proxies shall be allowed. Within one day of such vote, the
19 committee shall make publicly available a written copy of
20 such vote and, if a meeting or portion thereof is closed to
21 the public, a full written explanation of its action.
22 "(B) Each standing, select, or special committee or
23 subcommittee shall make public announcement of the date,
24 place, and subject matter of each meeting at least one week

1 before such meeting unless the committee or subcommittee
2 determines by a vote of a majority of a quorum of the com-
3 mittee or subcommittee present that committee business re-
4 quires that such meeting be called at an earlier date, in which
5 case the committee shall make public announcement of the
6 date, place, and subject matter of such meeting at the earliest
7 practicable opportunity.

8 "(C) A complete transcript shall be made of each meet-
9 ing of each standing, select, or special committee or subcom-
10 mittee (whether open or closed to the public). Except as
11 provided in paragraph (D), a copy of each such transcript
12 shall be made available for public inspection within seven
13 days of each such meeting, and additional copies of any tran-
14 script shall be furnished to any person at the actual cost of
15 duplication. Notwithstanding the provisions of paragraph
16 (D), in the case of meetings closed to the public, the portion
17 of such transcript made available for public inspection shall
18 include a list of all persons attending and their affiliation,
19 except for any portion of such list which would disclose
20 the identity of a confidential source, or endanger the
21 life or physical safety of law enforcement personnel.

22 "(D) In the case of meetings closed to the public pur-
23 suant to subparagraph (A), the committee or subcommittee
24 may delete from the copies of transcripts that are required
25 to be made available or furnished to the public pursuant to
26 subparagraph (C), portions which it determines by vote of

1 the majority of a quorum of the committee or subcom-
2 mittee consist of material specified in subsection (i), (ii),
3 (iii), (iv), or (v) of subparagraph (A). A separate vote
4 of the committee or subcommittee shall be taken with respect
5 to the transcript of such meeting. The vote of each committee
6 or subcommittee member participating in each such vote shall
7 be recorded and published, and no proxies shall be allowed.
8 In place of each portion deleted from copies of the transcript
9 made available to the public, the committee or subcommittee
10 shall supply a full written explanation of why such por-
11 tion was deleted and a summary of the substance of the
12 deleted portion that does not itself disclose information speci-
13 fied in subsection (i), (ii), (iii), (iv), or (v) of subpara-
14 graph (A). The committee or subcommittee shall main-
15 tain a complete copy of the transcript of each meeting (in-
16 cluding those portions deleted from copies made available to
17 the public), for a period of at least one year after such
18 meeting, or until the Congress following the one in which
19 such meeting was held is assembled, whichever occurs later.
20 "(E) A point of order may be raised against any com-
21 mittee or subcommittee vote to close a meeting to the public
22 pursuant to subparagraph (A), or against any committee or
23 subcommittee vote to delete from the publicly available copy
24 a portion of a meeting transcript pursuant to subparagraph
25 (D), by committee or subcommittee members comprising

1 one-fourth or more of the total number of the members of
2 such committee or subcommittee present and voting for or
3 against such action. Any such point of order must be raised
4 before the entire House within two calendar days after the
5 vote against which the point of order is raised, and such point
6 of order shall be a matter of highest personal privilege. Each
7 such point of order shall immediately be referred to a Select
8 Committee on Meetings consisting of the Speaker of the
9 House of Representatives, the majority leader, and the mi-
10 nority leader. The select committee shall report to the House
11 within five calendar days (excluding days where the House
12 is not in session) a resolution containing its findings. If the
13 House adopts a resolution finding that the committee vote in
14 question was not in accordance with the relevant subsection,
15 it shall direct that there be made publicly available the entire
16 transcript of the meeting improperly closed to the public or
17 the portion or portions of any meeting transcript improperly
18 deleted from the publicly available copy.

19 "(F) The Select Committee on Meetings shall not be
20 subject to the provisions of subparagraph (A), (B), (C),
21 or (D) of this section."

22 SEC. 103. (a) JOINT AND CONFERENCE COMMIT-
23 TEES.—The Legislative Reorganization Act of 1946 is
24 amended by inserting after section 133C, as added by sec-
25 tion 101(3) of this Act, the following new section:

1 "OPEN JOINT AND CONFERENCE COMMITTEE MEETINGS

2 "SEC. 133D. (a) Each meeting of each joint committee
3 and each subcommittee thereof, and each committee of con-
4 ference shall be open to the public: *Provided,* That a por-
5 tion or portions of such meetings may be closed to the public
6 if the committee determines by vote of a majority of a quo-
7 rum of the committee or subcommittee present that the
8 matters to be discussed or the testimony to be taken at such
9 portion or portions—

10 "(1) will disclose matters necessary to be kept secret
11 in the interests of national defense or the necessarily
12 confidential conduct of the foreign policy of the United
13 States;

14 "(2) will relate solely to matters of committee staff
15 personnel or internal staff management or administration;

16 "(3) will tend to charge with crime or misconduct,
17 or to disgrace any person, or will represent a clearly
18 unwarranted invasion of the privacy of any individual:
19 *Provided,* That this paragraph shall not apply to any
20 Government officer or employee with respect to his of-
21 ficial duties or employment: *And provided further,* That
22 as applied to a witness at a meeting, this paragraph shall
23 not apply unless the witness requests in writing that the
24 hearing be closed to the public;

25 "(4) will disclose information pertaining to any

1 investigation conducted for law enforcement purposes,
2 but only to the extent that the disclosure would (A) in-
3 terfere with enforcement proceedings, (B) deprive a
4 person of a right to a fair trial or an impartial adjudi-
5 cation, (C) disclose the identity of a confidential source
6 and, in the case of a record compiled by a criminal law
7 enforcement authority in the course of a criminal investi-
8 gation, or by an agency conducting a lawful national
9 security intelligence investigation, confidential informa-
10 tion furnished only by the confidential source, (D)
11 disclose investigative techniques and procedures, or (E)
12 endanger the life or physical safety of law enforcement
13 personnel; or
14 "(5) will disclose information relating to the trade
15 secrets or financial or commercial information pertaining
16 specifically to a given person where—
17 "(A) a Federal statute requires the informa-
18 tion to be kept confidential by Government officers
19 and employees; or
20 "(B) the information has been obtained by the
21 Federal Government on a confidential basis other
22 than through an application by such person for a
23 specific Government financial or other benefit, and
24 the information must be kept secret in order to pre-

1 vent grave and irreparable injury to the competitive
2 position of such person.
3 A separate vote of the committee shall be taken with respect
4 to each committee or subcommittee meeting a portion or
5 portions of which are proposed to be closed to the public
6 pursuant to this subsection. The vote of each committee
7 member participating in each such vote shall be recorded
8 and no proxies shall be allowed. Within one day of such
9 vote, the committee shall make publicly available a written
10 copy of such vote and, if a meeting or portion thereof is
11 closed to the public, a full written explanation of its action.
12 "(b) Each joint committee, subcommittee, and commit-
13 tee of conference shall make public announcement of the
14 date, place, and subject matter of each meeting at least one
15 week before such meeting unless the committee or subcom-
16 mittee determines by a vote of a majority of a quorum of
17 the committee or subcommittee present that committee busi-
18 ness requires that such meeting be called at an earlier date,
19 in which case the committee shall make public announce-
20 ment of the date, place, and subject matter of such meeting
21 at the earliest practicable opportunity.
22 "(c) A complete transcript shall be made of each meet-
23 ing of each joint committee, subcommittee, and committee
24 of conference (whether open or closed to the public). Ex-

1 cept as provided in subsection (d) of this section, a copy
2 of each such transcript shall be made available for public
3 inspection within seven days of each such meeting, and addi-
4 tional copies of any transcript shall be furnished to any per-
5 son at the actual cost of duplication. Notwithstanding the
6 provisions of subsection (d), in the case of meetings closed
7 to the public, the portion of such transcript made available
8 for public inspection shall include a list of all persons
9 attending and their affiliation, except for any portion of
10 such list which would disclose the identity of a confidential
11 source, or endanger the life or physical safety of law enforce-
12 ment personnel.

13 "(d) In the case of meetings closed to the public pur-
14 suant to subsection (a) of this section, the joint committee,
15 subcommittee, or committee of conference may delete from
16 the copies of transcripts that are required to be made avail-
17 able or furnished to the public pursuant to subsection (c) of
18 this section, those portions which it determines by vote of the
19 majority of a quorum of the committee or subcommittee con-
20 sist of materials specified in paragraph (1), (2), (3), (4),
21 or (5) of subsection (a) of this section. A separate vote of
22 the committee or subcommittee shall be taken with respect to
23 the transcript of such meeting. The vote of each committee or
24 subcommittee member participating in each such vote shall
25 be recorded and published, and no proxies shall be allowed.
26 In place of each portion deleted from copies of the transcript

1 made available to the public, the committee or subcommittee
2 shall supply a full written explanation of why such portion
3 was deleted, and a summary of the substance of the deleted
4 portion that does not itself disclose information specified in
5 paragraph (1), (2), (3), (4), or (5) of subsection (a) of
6 this section. The committee or subcommittee shall maintain
7 a complete copy of the transcript of each meeting (including
8 those portions deleted from copies made available to the pub-
9 lic), for a period of at least one year after such meeting, or
10 until the Congress following the one in which such meeting
11 was held is assembled, whichever occurs later.

12 "(e) A point of order may be raised against any com-
13 mittee vote of a joint committee, subcommittee, or committee
14 of conference to close a meeting to the public pursuant to sub-
15 section (a) of this section, or any committee or subcommittee
16 vote to delete from the publicly available copy a portion of a
17 meeting transcript pursuant to subsection (d) of this section
18 by committee or subcommittee members comprising one-
19 fourth or more of the total number of the members of such
20 committee or subcommittee present and voting for or against
21 such action. Any such point of order shall be raised in either
22 House within two calendar days after the vote against which
23 the point of order is raised, and such point of order shall be
24 a matter of highest personal privilege. Each such point of

1 order shall immediately be referred to a Select Joint Com-
2 mittee on Meetings consisting of the President pro tempore
3 of the Senate, the Speaker of the House of Representatives,
4 and the majority and minority leaders from each House. The
5 select committee shall examine the complete verbatim tran-
6 script of the meeting in question and shall rule whether the
7 vote to close the meeting was in accordance with subsection
8 (a) of this section, or whether the vote to delete a portion or
9 portions from publicly available copies of the meeting tran-
10 script was in accordance with subsection (d) of this section,
11 as the case may be. The select committee shall report to both
12 Houses a concurrent resolution within five calendar days
13 (excluding days where either House is not in session) con-
14 taining its findings. If both Houses adopt such a resolution
15 finding that the committee vote in question was not in
16 accordance with the relevant subsection, they shall direct
17 that there be made publicly available the entire transcript of
18 the meeting improperly closed to the public, or the portion
19 or portions of any meeting transcript improperly deleted from
20 the publicly available copy, as the case may be.
21 "(f) The Select Joint Committee on Meetings shall not
22 be subject to the provisions of subsection (a), (b), (c), or
23 (d) of this section."
24 (b) Title I of the table of contents of the Legislative Re-
25 organization Act of 1946 is amended by inserting immedi-

1 ately below item 133C, as added by section 101(c) of this
2 Act, the following:

"133D. Open joint and conference committee meetings.".

3 SEC. 104. EXERCISE OF RULEMAKING POWERS.—The
4 provisions of this title are enacted by the Congress—
5 (1) as an exercise of the rulemaking power of the
6 Senate and the House of Representatives, respectively,
7 and as such they shall be considered as part of the rules
8 of each House, respectively, or of that House to which
9 they specifically apply, and such rules shall supersede
10 other rules only to the extent that they are inconsistent
11 therewith; and
12 (2) with full recognition of the constitutional right
13 of either House to change such rules (so far as relating
14 to such House) at any time, in the same manner, and to
15 the same extent as in the case of any other rule of such
16 House.

17 TITLE II—AGENCY PROCEDURES

18 SEC. 201. (a) This section applies, according to the
19 provisions thereof, to any agency, as defined in section 551
20 (1) of title 5, United States Code, where the body compris-
21 ing the agency consists of two or more members. Except as
22 provided in subsection (b), all meetings (including meetings
23 to conduct hearings) of such agencies, or a subdivision there-
24 of authorized to take action on behalf of the agency, shall be

1 open to the public. For purposes of this section, a meeting
2 consists of any procedure by which official agency business is
3 considered or discussed by at least the number of agency
4 members (or of members of a subdivision of the agency au-
5 thorized to take action on behalf of the agency), required to
6 take action on behalf of the agency.

7 (b) Subsection (a) shall not apply to any portion or
8 portions of an agency meeting where the agency determines
9 by a vote of a majority of its entire membership, or, in the
10 case of a subdivision thereof authorized to take action on
11 behalf of the agency, a majority of the membership of such
12 subdivision, that such portion or portions of the meeting—

13 (1) will disclose matters necessary to be kept secret
14 in the interests of national defense or the necessarily con-
15 fidential conduct of the foreign policy of the United
16 States;

17 (2) will relate solely to individual agency person-
18 nel or to internal agency office management and adminis-
19 tration or financial auditing;

20 (3) will tend to charge with crime or misconduct,
21 or to disgrace any person, or will represent a clearly
22 unwarranted invasion of the privacy of any individual:
23 *Provided,* That this paragraph shall not apply to any
24 Government officer or employee with respect to his offi-
25 cial duties or employment: *And provided further,* That

1 as applied to a witness at a meeting this paragraph shall
2 not apply unless the witness requests in writing that the
3 meeting be closed to the public;
4 (4) will disclose information pertaining to any in-
5 vestigation conducted for law enforcement purposes, but
6 only to the extent that the disclosure would (A) inter-
7 fere with enforcement proceedings, (B) deprive a per-
8 son of a right to a fair trial or an impartial adjudication,
9 (C) disclose the identity of a confidential source and, in
10 the case of a record compiled by a criminal law enforce-
11 ment authority in the course of a criminal investigation,
12 or by an agency conducting a lawful national security
13 intelligence investigation, confidential information fur-
14 nished only by the confidential source, (D) disclose
15 investigative techniques and procedures, (E) endanger
16 the life or physical safety of law enforcement personnel;
17 or (F) in the case of an agency authorized to regulate
18 the issuance or trading of securities, disclose informa-
19 tion concerning such securities, or the markets in which
20 they are traded, when such information must be kept
21 confidential in order to avoid premature speculation in
22 the trading of such securities; or
23 (5) will disclose information relating to the trade
24 secrets or financial or commercial information pertain-
25 ing specifically to a given person where—

1 (A) a Federal statute requires the information
2 to be kept confidential by Government officers and
3 employees; or
4 (B) the information has been obtained by the
5 Federal Government on a confidential basis other
6 than through an application by such person for a
7 specific Government financial or other benefit and
8 the information must be kept secret in order to pre-
9 vent grave and irreparable injury to the competitive
10 position of such person;
11 (6) will relate to the conduct or disposition (but
12 not the initiation) of a case of adjudication governed by
13 the provisions of the first paragraph of section 554(a)
14 of title 5, United States Code, or of subsection (1),
15 (2), (4), (5), or (6) thereof.
16 A separate vote of the agency members, or the members of
17 a subdivision thereof authorized to take action on behalf of
18 the agency, shall be taken with respect to each agency
19 meeting a portion or portions of which are proposed to
20 be closed to the public pursuant to this subsection. The vote
21 of each agency member participating in such vote shall be
22 recorded and no proxies shall be allowed. Within one day of
23 such vote, the agency shall make publicly available a written
24 copy of such vote and, if a meeting or portion thereof is closed
25 to the public, a full written explanation of its action.

80-459 O - 77 - 9

1 (c) Each agency shall make public announcement of
2 the date, place, and subject matter of each meeting, and
3 whether open or closed to the public, at least one week before
4 each meeting. Such announcement shall be made unless the
5 agency determines by a vote of the majority of its members,
6 or in the case of a subdivision thereof authorized to take
7 action on behalf of the agency, a majority of the members of
8 the subdivision, that agency business requires that such meet-
9 ings be called at an earlier date, in which case the agency
10 shall make public announcement of the date, place, and sub-
11 ject matter of such meeting, and whether open or closed to
12 the public, at the earliest practicable opportunity.
13 (d) A complete transcript or electronic recording ad-
14 equate to fully record the proceedings shall be made of each
15 meeting of each agency (whether open or closed to the pub-
16 lic). Except as provided in subsection (e) of this section a
17 copy of the transcript or electronic recording of each such
18 meeting, together with any official minutes of such meeting,
19 shall be made available to the public for inspection, and
20 additional copies of any such transcript, minutes, or record-
21 ing (or a copy of a transcription of the electronic recording),
22 shall be furnished to any person at the actual cost of duplica-
23 tion or transcription. Notwithstanding the provisions of sub-
24 section (e), in the case of meetings closed to the public,
25 the portion of such transcript made available for public
26 inspection or electronic recording shall include a list

1 of all persons attending and their affiliation, except for any
2 portion of such list which would disclose the identity of a
3 confidential source, or endanger the life or physical safety
4 of law enforcement personnel.

5 (e) In the case of meetings closed to the public pursuant
6 to subsection (b) of this section, the agency may delete from
7 the copies of transcripts, electronic recordings, and minutes
8 made available or furnished to the public pursuant to subsec-
9 tion (d) of this section, those portions which the agency
10 determines by vote of a majority of its membership consist
11 of materials specified in paragraph (1), (2), (3), (4),
12 (5), or (6) of subsection (b) of this section. A separate
13 vote of the agency shall be taken with respect to each tran-
14 script, electronic recording, or minutes. The vote of each
15 agency member participating in such vote shall be recorded
16 and published, and no proxies shall be allowed. In place of
17 each portion deleted from copies of the meeting transcript,
18 electronic recording, and minutes made available to the pub-
19 lic, the agency shall supply a full written explanation of why
20 such portion was deleted and a summary of the substance of
21 the deleted portion that does not itself disclose information
22 specified in paragraph (1), (2), (3), (4), (5), or (6) of
23 subsection (b). The agency shall maintain a complete ver-
24 batim copy of the transcript, or a complete electronic record-
25 ing of each meeting (including those portions deleted from

1 copies made available to the public), for a period of at least
2 two years after such meeting, or until one year after the con-
3 clusion of any proceeding with respect to which the meeting,
4 or a portion thereof, was held, whichever occurs later.
5 (f) Each agency subject to the requirements of this sec-
6 tion shall, within three hundred and sixty days after the en-
7 actment of this Act, following consultation with the Ad-
8 ministrative Conference of the United States and published
9 notice in the Federal Register of at least thirty days and
10 opportunity for written comment by any persons, promulgate
11 regulations to implement the requirements of subsections (a)
12 through (e) inclusive of this section. Such regulations must,
13 prior to final promulgation, receive the approval in writing
14 of the Assistant Attorney General, office of Legal Counsel,
15 certifying that in his opinion the regulations are in accord
16 with the requirements of this section. Any citizen or person
17 resident in the United States may bring a proceeding in the
18 United States Court of Appeals for the District of Columbia
19 Circuit—
20 (1) to require an agency to promulgate such regu-
21 lations if such agency has not promulgated such regu-
22 lations within the time period specified herein; or
23 (2) to set aside agency regulations issued pursu-
24 ant to this subsection that are not in accord with the
25 requirements of subsections (a) through (e) inclusive

1 of this section, and to require the promulgation of
2 regulations that are in accord with such subsections.
3 (g) The district courts of the United States shall have
4 jurisdiction to enforce the requirements of subsections (a)
5 through (e) inclusive of this section by declaratory judg-
6 ment, injunctive relief, or otherwise. Such actions shall
7 be brought within sixty days after the meeting whose closing
8 is challenged as a violation of this section: *Provided,* That if
9 public notice of such meeting was not provided by the agency
10 in accordance with the requirements of this section, such
11 action shall be brought within sixty days of such meeting
12 or such public announcement, whichever is the later. Such
13 actions shall be brought against an agency and its members
14 by any citizen or person resident in the United States. Such
15 actions may be brought in the district wherein the plaintiff
16 resides, or has his principal place of business, or where the
17 agency in question has its headquarters. In such actions a
18 defendant shall serve his answer within twenty days after
19 the service of the complaint. The burden is on the agency to
20 sustain its action. Except as to causes the court considers
21 of greater importance, proceedings before the district court,
22 as authorized by this paragraph, take precedence on the
23 docket over all other causes and shall be assigned a hearing
24 and trial at the earliest practicable date and expedited in
25 every way. In deciding such cases the court may examine

1 any portion of a meeting transcript or electronic recording
2 that was deleted from the publicly available copy and may
3 take such additional evidence as it deems necessary. Among
4 other forms of equitable relief, including the granting of an
5 injunction against future violations of this section, the court
6 may require that any portion of a meeting transcript or elec-
7 tronic recording improperly deleted from the publicly avail-
8 able copy be made publicly available for inspection and copy-
9 ing, and, having due regard for orderly administration and
10 the public interest, may set aside any agency action taken
11 or discussed at an agency meeting improperly closed to the
12 public. The jurisdiction of the district courts under this sub-
13 section shall be concurrent with that of any other court other-
14 wise authorized by law to review agency action. Any such
15 court may, at the application of any person otherwise prop-
16 erly a party to a proceeding before such court to review an
17 agency action, inquire into asserted violations by the agency
18 of the requirements of this section and afford the relief au-
19 thorized by this section in the case of proceedings by district
20 courts.

21 (h) In any action brought pursuant to subsection (f)
22 or (g) of this section, the reasonable costs of litigation (in-
23 cluding reasonable fees for attorneys and expert witnesses)
24 may be apportioned to the original parties or their successors
25 in interest whenever the court determines such award is ap-

1 propriate. In the case of apportionment of costs against an
2 agency or its members, the costs may be assessed by the
3 court against the United States.

4 (i) The agencies subject to the requirements of this
5 section shall annually report to Congress regarding their
6 compliance with such requirements, including a tabulation
7 of the total number of agency meetings open to the public,
8 the total number of meetings closed to the public, the rea-
9 sons for closing such meetings, and a description of any
10 litigation brought against the agency under this section.

11 SEC. 202. Title 5 of the United States Code is amended
12 by adding after section 557 the following:

13 "EX PARTE COMMUNICATIONS IN AGENCY PROCEEDING

14 "SEC. 557A. (a) DEFINITIONS.—For purposes of this
15 section—

16 "(1) 'Ex parte communication' means a com-
17 munication relevant to an on-the-record agency pro-
18 ceeding where such communication is not made on the
19 record, or openly at a scheduled hearing session in such
20 proceeding, and reasonable notice thereof is not given to
21 all parties to, or intervenors in, such proceedings.

22 "(2) 'Interested person' means any person (includ-
23 ing a member or employee of any Government agency or
24 authority) other than a member or employee of the

1 agency before which the on-the-record proceeding is
2 pending who communicates with an agency member or
3 employee with respect to any such on-the-record agency
4 proceeding.

5 "(3) 'On-the-record agency proceeding' means any
6 proceedings before any agency where the agency action,
7 or a portion thereof, is required by law to be determined
8 on the record after an opportunity for an agency hearing.

9 "(b) This section applies to any on-the-record agency
10 proceeding.

11 "(c) In any agency proceeding which is subject to sub-
12 section (b) of this section—

13 "(1) no interested person shall make or cause to be
14 made to any member of the agency in question, adminis-
15 trative judge, or employee who is or may be involved in
16 the decisional process of the proceeding any ex parte
17 communication;

18 "(2) no member of the agency in question, adminis-
19 trative judge, or employee who is or may be involved in
20 the decisional process of the proceeding shall make or
21 cause to be made to an interested person any ex parte
22 communication;

23 "(3) a member of the agency in question, adminis-
24 trative judge, or employee who is or may be involved

1 in the decisional process of the proceeding, who receives
2 a communication in violation of this subsection, shall
3 place in the public record of the proceeding—
4 "(A) any written material submitted in viola-
5 tion of this subsection; and
6 "(B) a memorandum stating the substance of
7 each oral communication submitted in violation of
8 this subsection; and
9 "(C) responses, if any, to the materials de-
10 scribed in subparagraphs (A) and (B) of this
11 subsection;
12 "(4) upon obtaining knowledge of a communica-
13 tion in violation of this subsection prompted by or from
14 a party or intervenors to any proceeding to which this
15 section applies, the agency members or member, the
16 administrative judge, or employee presiding at the hear-
17 ings may, to the extent consistent with the interests of
18 justice and the policy of the underlying statutes, require
19 the party or intervenors to show cause why his claim
20 or interest in the proceeding should not be dismissed,
21 denied, disregarded, or otherwise adversely affected by
22 virtue of such violation.
23 "(d) The prohibitions of this section shall not apply—
24 "(1) to any proceeding to the extent required for
25 the disposition of ex parte matters as authorized by law;

1 "(2) to any written communication from persons
2 who are neither parties or intervenors to the proceeding,
3 nor government officials acting in their official capacity,
4 where such communications are promptly placed in the
5 public docket file of the proceedings.

6 "(e) The prohibitions of this section shall apply at
7 such time as the agency shall designate, having due regard
8 for the public interest in open decisionmaking by agencies,
9 but in no case shall they apply later than the time at which a
10 proceeding is noticed for hearing. If the person responsible
11 for the communication has knowledge that the proceeding
12 will be noticed, the prohibitions of this section shall apply at
13 the time of his acquisition of such knowledge. In the case of
14 any person who files with an agency any application, petition,
15 or other form of request for agency action, the prohibitions
16 of this section shall apply, with respect to communications
17 with such person, commencing at the time of such filing or
18 at the time otherwise provided by this subsection, whichever
19 occurs first.

20 "(f) Every agency notice of an opportunity for partici-
21 pation by interested persons in a hearing shall contain a
22 statement as follows:

23 "(1) if such notice relates to an on-the-record
24 agency proceeding, it shall state that the proceeding is
25 subject to the provisions of this section with respect
26 to ex parte communications;

1 "(2) if such notice relates to an agency proceeding
2 not on-the-record, it shall state that the proceeding is not
3 subject to the provisions of this section with respect to
4 ex parte communications.
5 If a notice of hearing with respect to any proceeding before
6 an agency fails to comply with this section, the proceeding
7 shall be deemed to be an on-the-record agency proceeding for
8 purposes of ex parte communications.
9 "(g) Each agency subject to the requirements of this
10 section shall, within three hundred and sixty days after the
11 enactment of this section, following consultation with the
12 Administrative Conference of the United States and pub-
13 lished notice in the Federal Register of at least thirty days
14 and opportunity for written comment, promulgate regulations
15 to implement the requirements of this section. Any citizen or
16 person resident in the United States may bring a proceeding
17 in the United States Court of Appeals for the District of
18 Columbia Circuit—
19 "(1) to require any agency to promulgate regula-
20 tions if the agency has not promulgated such regulations
21 within the time period specified; or
22 "(2) to set aside agency regulations issued pursuant
23 to this subsection that are not in accord with the require-
24 ments of this section, and to require the promulgation
25 of regulations that are in accord with this section.

1 "(h) Nothing in this section shall be construed to per-
2 mit any communication which is prohibited by any other
3 provision of law, or to prohibit any agency from adopting,
4 by rule or otherwise, prohibitions or regulations governing
5 ex parte communications which are additional to, or more
6 stringent than, the requirements of this section.

7 "(i) The district courts of the United States shall have
8 jurisdiction to enforce the requirements of subsections (c)
9 and (e) of this section by declaratory judgment, injunctive
10 relief, or otherwise. The action may be brought by any
11 citizen of or person resident in the United States. The
12 action shall be brought in the district wherein the plaintiff
13 resides or has his principal place of business, or where the
14 agency in question has its headquarters. Where a person
15 other than an agency, agency member, administrative judge,
16 or employee is alleged to have participated in a violation of
17 the requirements of this section, such person may, but need
18 not, be joined as a party defendant; for purposes of joining
19 such person as a party defendant, service may be had on
20 such person in any district. Among other forms of equitable
21 relief, the court may require that any ex parte communica-
22 tion made or received in violation of the requirements of this
23 section be published, and, having due regard for orderly
24 administration and the public interest, may set aside any
25 agency action taken in a proceeding where the violation

1 occurred. The jurisdiction of the district courts under this
2 subsection shall be concurrent with that of any other court
3 otherwise authorized by law to review agency action. Any
4 such court may, at the application of any person otherwise
5 properly a party to a proceeding before such court to review
6 an agency action, inquire into asserted violations by the
7 agency of the requirements of this section, and afford the
8 relief authorized by this section in the case of proceedings
9 by district courts.

10 "(j) In any action brought pursuant to subsection (g)
11 and (i) of this section, cost of litigation (including reason-
12 able fees for attorneys and expert witnesses) may be appor-
13 tioned to the original parties or their successors in interest
14 whenever the court determines such award is appropriate."

15 SEC. 203. This title and the amendments made by this
16 title do not authorize withholding of information or limit the
17 availability of records to the public except as provided in this
18 title. This title does not authorize any information to be
19 withheld from Congress.

[From the Congressional Record—Senate, Nov. 5, 1975]

(S 19372—S 19378)

Government in the Sunshine Act

The Presiding Officer (Mr. Fannin). Under the previous order, the Senate will now proceed to the consideration of S. 5, which the clerk will state.

The assistant legislative clerk read as follows:

A bill (S. 5) to provide that meetings of Government agencies and of congressional committees shall be open to the public, and for other purposes.

The Senate proceeded to consider the bill, which had been reported from the Committee on Government Operations and the Committee on Rules and Administration, each with an amendment.

The amendment of the Committee on Government Operations is to strike all after the enacting clause and insert the following:

Calendar No. 343

94TH CONGRESS
1ST SESSION

S. 5

[Report No. 94–354]

IN THE SENATE OF THE UNITED STATES

JANUARY 15, 1975

Mr. CHILES (for himself, Mr. ABOUREZK, Mr. BAYH, Mr. BEALL, Mr. BIDEN, Mr. BROCK, Mr. BROOKE, Mr. CASE, Mr. CHURCH, Mr. CLARK, Mr. CRANSTON, Mr. GRAVEL, Mr. GARY W. HART, Mr. PHILIP A. HART, Mr. HASKELL, Mr. HATFIELD, Mr. HATHAWAY, Mr. HELMS, Mr. HOLLINGS, Mr. HUMPHREY, Mr. JACKSON, Mr. LEAHY, Mr. MCGOVERN, Mr. MANSFIELD, Mr. MATHIAS, Mr. METCALF, Mr. MONDALE, Mr. MUSKIE, Mr. NELSON, Mr. NUNN, Mr. PACKWOOD, Mr. PERCY, Mr. PROXMIRE, Mr. RIBICOFF, Mr. ROTH, Mr. STAFFORD, Mr. STONE, Mr. SYMINGTON, Mr. TUNNEY, and Mr. WEICKER) introduced the following bill; which was read twice and referred to the Committee on Government Operations

JULY 31, 1975

Reported by Mr. CHILES, with an amendment

[Strike out all after the enacting clause and insert the part printed in italic]

A BILL

To provide that meetings of Government agencies and of congressional committees shall be open to the public, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 ~~SECTION 1. SHORT TITLE. This Act may be cited as~~
4 ~~the "Government in the Sunshine Act".~~

II—O

1 ~~SEC. 2. DECLARATION OF POLICY. It is hereby de-~~
2 ~~clared to be the policy of the United States that the public~~
3 ~~is entitled to the fullest practicable information regarding~~
4 ~~the decisionmaking processes of the Federal Government.~~
5 ~~SEC. 3. DEFINITIONS. For purposes of this Act—~~
6 ~~(1) "National defense" means—~~
7 ~~(A) the protection of the United States and its~~
8 ~~military forces against actual or potential military~~
9 ~~attack by a foreign power;~~
10 ~~(B) the obtaining of foreign intelligence informa-~~
11 ~~tion deemed essential to the military defense of the~~
12 ~~United States or its forces;~~
13 ~~(C) the protection of information essential to the~~
14 ~~military defense of the United States or its forces against~~
15 ~~foreign intelligence activities; or~~
16 ~~(D) the protection, to the extent specifically found~~
17 ~~necessary by the President in writing, of the United~~
18 ~~States against overthrow of the Government by force;~~
19 ~~and~~
20 ~~(2) "Person" includes an individual, partnership, cor-~~
21 ~~poration, associated governmental authority, or public or~~
22 ~~private organization.~~
23 ~~TITLE I—CONGRESSIONAL PROCEDURES~~
24 ~~SEC. 101. SENATE COMMITTEE HEARING PRO-~~
25 ~~CEDURE. (a) The Legislative Reorganization Act of 1946~~
26 ~~is amended—~~

1 ~~(1) by striking out the third sentence of section~~
2 ~~133(b);~~
3 ~~(2) by striking out subsections (a), (b), and (f)~~
4 ~~of section 133A~~;
5 ~~(3) by adding after section 133B the following~~:
6 "~~OPEN SENATE COMMITTEE MEETINGS~~
7 "~~SEC. 133C. (a) Each meeting of each standing, select,~~
8 ~~or special committee of the Senate, or subcommittee thereof,~~
9 ~~including meetings to conduct hearings, shall be open to the~~
10 ~~public: *Provided*, That a portion or portions of such meet-~~
11 ~~ings may be closed to the public if the committee or subcom-~~
12 ~~mittee, as the case may be, determines by a vote of a majority~~
13 ~~of a quorum of the committee or subcommittee present that~~
14 ~~the matters to be discussed or the testimony to be taken at~~
15 ~~such portion or portions—~~
16 "~~(1) will disclose matters necessary to be kept~~
17 ~~secret in the interests of national defense or the neces-~~
18 ~~sarily confidential conduct of the foreign policy of the~~
19 ~~United States~~;
20 "~~(2) will relate solely to matters of committee staff~~
21 ~~personnel or internal staff management or administra-~~
22 ~~tion;~~
23 "~~(3) will tend to charge with crime or misconduct,~~
24 ~~or to disgrace any person, or will represent a clearly-~~
25 ~~unwarranted invasion of the privacy of any individual:~~
26 ~~*Provided*, That this paragraph shall not apply to any~~

~~Government officer or employee with respect to his official duties or employment: *And provided further*, That as applied to a witness at a meeting, this paragraph shall not apply unless the witness requests in writing that the hearing be closed to the public;~~

"~~(4) will disclose information pertaining to any investigation conducted for law enforcement purposes, but only to the extent that the disclosure would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (D) disclose investigative techniques and procedures, or (E) endanger the life or physical safety of law enforcement personnel; or~~

"~~(5) will disclose information relating to the trade secrets or financial or commercial information pertaining specifically to a given person where~~

"~~(A) a Federal statute requires the information to be kept confidential by Government officers and employees; or~~

"~~(B) the information has been obtained by the~~

1 ~~Federal Government on a confidential basis other~~
2 ~~than through an application by such person for a~~
3 ~~specific Government financial or other benefit, and~~
4 ~~the information must be kept secret in order to pre-~~
5 ~~vent grave and irreparable injury to the competitive~~
6 ~~position of such person.~~
7 ~~A separate vote of the committee shall be taken with respect~~
8 ~~to each committee or subcommittee meeting a portion or por-~~
9 ~~tions of which are proposed to be closed to the public pur-~~
10 ~~suant to this subsection. The vote of each committee member~~
11 ~~participating in each such vote shall be recorded and no~~
12 ~~proxies shall be allowed. Within one day of such vote, the~~
13 ~~committee shall make publicly available a written copy of~~
14 ~~such vote and, if a meeting or portion thereof is closed to the~~
15 ~~public, a full written explanation of its action.~~
16 "~~(b) Each standing, select, or special committee of the~~
17 ~~Senate, or subcommittee thereof, shall make public announce-~~
18 ~~ment of the date, place, and subject matter of each meeting~~
19 ~~at least one week before such meeting unless the committee~~
20 ~~or subcommittee determines by a vote of a majority of a~~
21 ~~quorum of the committee or subcommittee present that com-~~
22 ~~mittee business requires that such meeting be called at an~~
23 ~~earlier date, in which case the committee shall make public~~
24 ~~announcement of the date, place, and subject matter of such~~
25 ~~meeting at the earliest practicable opportunity~~.
26 "~~(c) A complete transcript shall be made of each meet-~~

~~ing of each standing, select, or special committee or subcommittee (whether open or closed to the public). Except as provided in subsection (d) of this section, a copy of each such transcript shall be made available for public inspection within seven days of each such meeting, and additional copies of any transcript shall be furnished to any person at the actual cost of duplication. Notwithstanding the provisions of subsection (d), in the case of meetings closed to the public, the portion of such transcript made available for public inspection shall include a list of all persons attending and their affiliation, except for any portion of such list which would disclose the identity of a confidential source, or endanger the life or physical safety of law enforcement personnel.~~

"~~(d) In the case of meetings closed to the public pursuant to subsection (a) of this section, the committee or subcommittee may delete from the copies of transcripts that are required to be made available or furnished to the public pursuant to subsection (c) of this section, those portions which it determines by vote of the majority of a quorum of the committee or subcommittee consist of materials specified in paragraph (1), (2), (3), (4), or (5) of subsection (a) of this section. A separate vote of the committee or subcommittee shall be taken with respect to the transcript of each such meeting. The vote of each committee or subcommittee member participating in each such vote shall be recorded and published and no proxies shall be allowed. In~~

~~place of each portion deleted from copies of the transcript made available to the public, the committee or subcommittee shall supply a full written explanation of why such portion was deleted, and a summary of the substance of the deleted portion that does not itself disclose information specified in paragraph (1), (2), (3), (4), or (5) of subsection (a). The committee or subcommittee shall maintain a complete copy of the transcript of each meeting (including those portions deleted from copies made available to the public), for a period of at least one year after such meeting, or until the Congress following the one in which such meeting was held is assembled, whichever occurs later.~~

"~~(c) A point of order may be raised in the Senate against any committee or subcommittee vote to close a meeting to the public pursuant to subsection (a) of this section, or against any committee or subcommittee vote to delete from the publicly available copy a portion of a meeting transcript pursuant to subsection (d) of this section, by committee or subcommittee members comprising one-fourth or more of the total number of members of such committee or subcommittee present and voting for or against such action. Any such point of order shall be raised in the Senate within two calendar days after the vote against which the point of order is raised, and such point of order shall be a matter of highest personal privilege. Each such point of~~

1 ~~order shall immediately be referred to a Select Committee~~
2 ~~on Meetings consisting of the President pro tempore, the~~
3 ~~leader of the majority party, and the leader of the minority~~
4 ~~party. The select committee shall examine the complete~~
5 ~~verbatim transcript of the meeting in question and shall rule~~
6 ~~whether the vote to close the meeting was in accordance~~
7 ~~with subsection (a) of this section, or whether the vote to~~
8 ~~delete a portion or portions from publicly available copies~~
9 ~~of the meeting transcript was in accordance with subsection~~
10 ~~(d) of this section, as the case may be. The select committee~~
11 ~~shall report to the Senate within five calendar days (ex-~~
12 ~~cluding days where the Senate is not in session) a resolu-~~
13 ~~tion containing its findings. If the Senate adopts a resolution~~
14 ~~finding that the committee vote in question was not in~~
15 ~~accordance with the relevant subsection, it shall direct that~~
16 ~~there be made publicly available the entire transcript of~~
17 ~~the meeting improperly closed to the public or the portion~~
18 ~~or portions of any meeting transcript improperly deleted~~
19 ~~from the publicly available copy, as the case may be.~~
20 ~~"(f) The Select Committee on Meetings shall not be~~
21 ~~subject to the provisions of subsection (a), (b), (c), or~~
22 ~~(d) of this section."~~
23 ~~(b) Subsection (a) of subsection 242 of the Legislative~~
24 ~~Reorganization Act of 1970 is repealed.~~

1 ~~(c) Paragraph 7(b) of Rule XXV of the Standing~~
2 ~~Rules of the Senate is repealed.~~
3 ~~(d) Title I of the table of contents of the Legislative~~
4 ~~Reorganization Act of 1946 is amended by inserting imme-~~
5 ~~diately below item 133B the following:~~
~~"133C. Open Senate committee meetings.".~~
6 ~~SEC. 102. Clause 27 (f) (2) of Rule XI of the Rules of~~
7 ~~the House of Representatives is amended to read as follows:~~
8 ~~"(2) (A) Each meeting of each standing, select, or~~
9 ~~special committee or subcommittee, including meetings to~~
10 ~~conduct hearings, shall be open to the public: *Provided*, That~~
11 ~~a portion or portions of such meetings may be closed to the~~
12 ~~public if the committee or subcommittee, as the case may be,~~
13 ~~determines by vote of a majority of a quorum of the com-~~
14 ~~mittee or subcommittee present that the matters to be dis-~~
15 ~~cussed or the testimony to be taken at such portion or~~
16 ~~portions—~~
17 ~~"(i) will disclose matters necessary to be kept~~
18 ~~secret in the interests of national defense or the neces-~~
19 ~~sarily confidential conduct of the foreign policy of the~~
20 ~~United States;~~
21 ~~"(ii) will relate solely to matters of committee staff~~
22 ~~personnel or internal staff management or administra-~~
23 ~~tion;~~

1 "~~(iii) will tend to charge with crime or misconduct,~~
2 ~~or to disgrace any person, or will represent a clearly~~
3 ~~unwarranted invasion of the privacy of any individual:~~
4 ~~*Provided*, That this paragraph shall not apply to any~~
5 ~~Government officer or employee with respect to his offi-~~
6 ~~cial duties or employment: *And provided further*, That~~
7 ~~as applied to a witness at a meeting, this paragraph shall~~
8 ~~not apply unless the witness requests in writing that the~~
9 ~~hearing be closed to the public;~~
10 "~~(iv) will disclose information pertaining to any~~
11 ~~investigation conducted for law enforcement purposes,~~
12 ~~but only to the extent that the disclosure would (A)~~
13 ~~interfere with enforcement proceedings, (B) deprive~~
14 ~~a person of a right to a fair trial or an impartial adjudica-~~
15 ~~tion, (C) disclose the identity of a confidential source~~
16 ~~and, in the case of a record compiled by a criminal law~~
17 ~~enforcement authority in the course of a criminal investi-~~
18 ~~gation, or by an agency conducting a lawful national~~
19 ~~security intelligence investigation, confidential informa-~~
20 ~~tion furnished only by the confidential source, (D) dis-~~
21 ~~close investigative techniques and procedures, or (E)~~
22 ~~endanger the life or physical safety of law enforcement~~
23 ~~personnel; or~~
24 "~~(v) will disclose information relating to the trade~~

1 ~~secrets or financial or commercial information pertain-~~
2 ~~ing specifically to a given person where—~~
3 ~~"(I) a Federal statute requires the information~~
4 ~~to be kept confidential by Government officers and~~
5 ~~employees; or~~
6 ~~"(II) the information has been obtained by the~~
7 ~~Federal Government on a confidential basis other~~
8 ~~than through an application by such person for a~~
9 ~~specific Government financial or other benefit, and~~
10 ~~the information must be kept secret in order to~~
11 ~~prevent grave and irreparable injury to the competi-~~
12 ~~tive position of such person.~~
13 ~~A separate vote of the committee shall be taken with respect~~
14 ~~to each committee or subcommittee meeting a portion or por-~~
15 ~~tions of which are proposed to be closed to the public pur-~~
16 ~~suant to this subsection. The vote of each committee member~~
17 ~~participating in each such vote shall be recorded and no~~
18 ~~proxies shall be allowed. Within one day of such vote, the~~
19 ~~committee shall make publicly available a written copy of~~
20 ~~such vote and, if a meeting or portion thereof is closed to~~
21 ~~the public, a full written explanation of its action.~~
22 ~~"(B) Each standing, select, or special committee or~~
23 ~~subcommittee shall make public announcement of the date,~~
24 ~~place, and subject matter of each meeting at least one week~~

~~before such meeting unless the committee or subcommittee determines by a vote of a majority of a quorum of the committee or subcommittee present that committee business requires that such meeting be called at an earlier date, in which case the committee shall make public announcement of the date, place, and subject matter of such meeting at the earliest practicable opportunity.~~

~~"(C) A complete transcript shall be made of each meeting of each standing, select, or special committee or subcommittee (whether open or closed to the public). Except as provided in paragraph (D), a copy of each such transcript shall be made available for public inspection within seven days of each such meeting, and additional copies of any transcript shall be furnished to any person at the actual cost of duplication. Notwithstanding the provisions of paragraph (D), in the case of meetings closed to the public, the portion of such transcript made available for public inspection shall include a list of all persons attending and their affiliation, except for any portion of such list which would disclose the identity of a confidential source, or endanger the life or physical safety of law enforcement personnel.~~

~~"(D) In the case of meetings closed to the public pursuant to subparagraph (A), the committee or subcommittee may delete from the copies of transcripts that are required to be made available or furnished to the public pursuant to subparagraph (C), portions which it determines by vote of~~

1 ~~the majority of a quorum of the committee or subcom-~~
2 ~~mittee consist of material specified in subsection (i), (ii),~~
3 ~~(iii), (iv), or (v) of subparagraph (A). A separate vote~~
4 ~~of the committee or subcommittee shall be taken with respect~~
5 ~~to the transcript of such meeting. The vote of each committee~~
6 ~~or subcommittee member participating in each such vote shall~~
7 ~~be recorded and published, and no proxies shall be allowed.~~
8 ~~In place of each portion deleted from copies of the transcript~~
9 ~~made available to the public, the committee or subcommittee~~
10 ~~shall supply a full written explanation of why such por-~~
11 ~~tion was deleted and a summary of the substance of the~~
12 ~~deleted portion that does not itself disclose information speci-~~
13 ~~fied in subsection (i), (ii), (iii), (iv), or (v) of subpara-~~
14 ~~graph (A). The committee or subcommittee shall main-~~
15 ~~tain a complete copy of the transcript of each meeting (in-~~
16 ~~cluding those portions deleted from copies made available to~~
17 ~~the public), for a period of at least one year after such~~
18 ~~meeting, or until the Congress following the one in which~~
19 ~~such meeting was held is assembled, whichever occurs later.~~
20 ~~"(E) A point of order may be raised against any com-~~
21 ~~mittee or subcommittee vote to close a meeting to the public~~
22 ~~pursuant to subparagraph (A), or against any committee or~~
23 ~~subcommittee vote to delete from the publicly available copy~~
24 ~~a portion of a meeting transcript pursuant to subparagraph~~
25 ~~(D), by committee or subcommittee members comprising~~

~~one-fourth or more of the total number of the members of such committee or subcommittee present and voting for or against such action. Any such point of order must be raised before the entire House within two calendar days after the vote against which the point of order is raised, and such point of order shall be a matter of highest personal privilege. Each such point of order shall immediately be referred to a Select Committee on Meetings consisting of the Speaker of the House of Representatives, the majority leader, and the minority leader. The select committee shall report to the House within five calendar days (excluding days where the House is not in session) a resolution containing its findings. If the House adopts a resolution finding that the committee vote in question was not in accordance with the relevant subsection, it shall direct that there be made publicly available the entire transcript of the meeting improperly closed to the public or the portion or portions of any meeting transcript improperly deleted from the publicly available copy.~~

"~~(F) The Select Committee on Meetings shall not be subject to the provisions of subparagraph (A), (B), (C), or (D) of this section.~~"

~~SEC. 103. (a) JOINT AND CONFERENCE COMMITTEES. The Legislative Reorganization Act of 1946 is amended by inserting after section 133C, as added by section 101(3) of this Act, the following new section:~~

1 ~~"OPEN JOINT AND CONFERENCE COMMITTEE MEETINGS~~

2 ~~"SEC. 133D. (a) Each meeting of each joint committee~~

3 ~~and each subcommittee thereof, and each committee of con-~~

4 ~~ference shall be open to the public: *Provided*, That a por-~~

5 ~~tion or portions of such meetings may be closed to the public~~

6 ~~if the committee determines by vote of a majority of a quo-~~

7 ~~rum of the committee or subcommittee present that the~~

8 ~~matters to be discussed or the testimony to be taken at such~~

9 ~~portion or portions—~~

10 ~~"(1) will disclose matters necessary to be kept secret~~

11 ~~in the interests of national defense or the necessarily~~

12 ~~confidential conduct of the foreign policy of the United~~

13 ~~States;~~

14 ~~"(2) will relate solely to matters of committee staff~~

15 ~~personnel or internal staff management or administration;~~

16 ~~"(3) will tend to charge with crime or misconduct,~~

17 ~~or to disgrace any person, or will represent a clearly~~

18 ~~unwarranted invasion of the privacy of any individual:~~

19 ~~*Provided*, That this paragraph shall not apply to any~~

20 ~~Government officer or employee with respect to his of-~~

21 ~~ficial duties or employment: *And provided further*, That~~

22 ~~as applied to a witness at a meeting, this paragraph shall~~

23 ~~not apply unless the witness requests in writing that the~~

24 ~~hearing be closed to the public;~~

25 ~~"(4) will disclose information pertaining to any~~

1 ~~investigation conducted for law enforcement purposes,~~
2 ~~but only to the extent that the disclosure would (A) in-~~
3 ~~terfere with enforcement proceedings, (B) deprive a~~
4 ~~person of a right to a fair trial or an impartial adjudi-~~
5 ~~cation, (C) disclose the identity of a confidential source~~
6 ~~and, in the case of a record compiled by a criminal law~~
7 ~~enforcement authority in the course of a criminal investi-~~
8 ~~gation, or by an agency conducting a lawful national~~
9 ~~security intelligence investigation, confidential informa-~~
10 ~~tion furnished only by the confidential source, (D)~~
11 ~~disclose investigative techniques and procedures, or (E)~~
12 ~~endanger the life or physical safety of law enforcement~~
13 ~~personnel; or~~
14 ~~"(5) will disclose information relating to the trade~~
15 ~~secrets or financial or commercial information pertaining~~
16 ~~specifically to a given person where—~~
17 ~~"(A) a Federal statute requires the informa-~~
18 ~~tion to be kept confidential by Government officers~~
19 ~~and employees; or~~
20 ~~"(B) the information has been obtained by the~~
21 ~~Federal Government on a confidential basis other~~
22 ~~than through an application by such person for a~~
23 ~~specific Government financial or other benefit, and~~
24 ~~the information must be kept secret in order to pro-~~

1 ~~vent grave and irreparable injury to the competitive~~
2 ~~position of such person.~~
3 ~~A separate vote of the committee shall be taken with respect~~
4 ~~to each committee or subcommittee meeting a portion or~~
5 ~~portions of which are proposed to be closed to the public~~
6 ~~pursuant to this subsection. The vote of each committee~~
7 ~~member participating in each such vote shall be recorded~~
8 ~~and no proxies shall be allowed. Within one day of such~~
9 ~~vote, the committee shall make publicly available a written~~
10 ~~copy of such vote and, if a meeting or portion thereof is~~
11 ~~closed to the public, a full written explanation of its action.~~
12 ~~"(b) Each joint committee, subcommittee, and commit-~~
13 ~~tee of conference shall make public announcement of the~~
14 ~~date, place, and subject matter of each meeting at least one~~
15 ~~week before such meeting unless the committee or subcom-~~
16 ~~mittee determines by a vote of a majority of a quorum of~~
17 ~~the committee or subcommittee present that committee busi-~~
18 ~~ness requires that such meeting be called at an earlier date,~~
19 ~~in which case the committee shall make public announce-~~
20 ~~ment of the date, place, and subject matter of such meeting~~
21 ~~at the earliest practicable opportunity.~~
22 ~~"(c) A complete transcript shall be made of each meet-~~
23 ~~ing of each joint committee, subcommittee, and committee~~
24 ~~of conference (whether open or closed to the public). Ex-~~

1 ~~cept as provided in subsection (d) of this section, a copy~~
2 ~~of each such transcript shall be made available for public~~
3 ~~inspection within seven days of each such meeting, and addi-~~
4 ~~tional copies of any transcript shall be furnished to any per-~~
5 ~~son at the actual cost of duplication. Notwithstanding the~~
6 ~~provisions of subsection (d), in the case of meetings closed~~
7 ~~to the public, the portion of such transcript made available~~
8 ~~for public inspection shall include a list of all persons~~
9 ~~attending and their affiliation, except for any portion of~~
10 ~~such list which would disclose the identity of a confidential~~
11 ~~source, or endanger the life or physical safety of law enforce-~~
12 ~~ment personnel.~~
13 ~~"(d) In the case of meetings closed to the public pur-~~
14 ~~suant to subsection (a) of this section, the joint committee,~~
15 ~~subcommittee, or committee of conference may delete from~~
16 ~~the copies of transcripts that are required to be made avail-~~
17 ~~able or furnished to the public pursuant to subsection (c) of~~
18 ~~this section, those portions which it determines by vote of the~~
19 ~~majority of a quorum of the committee or subcommittee con-~~
20 ~~sist of materials specified in paragraph (1), (2), (3), (4),~~
21 ~~or (5) of subsection (a) of this section. A separate vote of~~
22 ~~the committee or subcommittee shall be taken with respect to~~
23 ~~the transcript of such meeting. The vote of each committee or~~
24 ~~subcommittee member participating in each such vote shall~~
25 ~~be recorded and published, and no proxies shall be allowed.~~
26 ~~In place of each portion deleted from copies of the transcript~~

~~made available to the public, the committee or subcommittee shall supply a full written explanation of why such portion was deleted, and a summary of the substance of the deleted portion that does not itself disclose information specified in paragraph (1), (2), (3), (4), or (5) of subsection (a) of this section. The committee or subcommittee shall maintain a complete copy of the transcript of each meeting (including those portions deleted from copies made available to the public), for a period of at least one year after such meeting, or until the Congress following the one in which such meeting was held is assembled, whichever occurs later.~~

~~"(c) A point of order may be raised against any committee vote of a joint committee, subcommittee, or committee of conference to close a meeting to the public pursuant to subsection (a) of this section, or any committee or subcommittee vote to delete from the publicly available copy a portion of a meeting transcript pursuant to subsection (d) of this section by committee or subcommittee members comprising one-fourth or more of the total number of the members of such committee or subcommittee present and voting for or against such action. Any such point of order shall be raised in either House within two calendar days after the vote against which the point of order is raised, and such point of order shall be a matter of highest personal privilege. Each such point of~~

1 ~~order shall immediately be referred to a Select Joint Com-~~
2 ~~mittee on Meetings consisting of the President pro tempore~~
3 ~~of the Senate, the Speaker of the House of Representatives,~~
4 ~~and the majority and minority leaders from each House. The~~
5 ~~select committee shall examine the complete verbatim tran-~~
6 ~~script of the meeting in question and shall rule whether the~~
7 ~~vote to close the meeting was in accordance with subsection~~
8 ~~(a) of this section, or whether the vote to delete a portion or~~
9 ~~portions from publicly available copies of the meeting tran-~~
10 ~~script was in accordance with subsection (d) of this section,~~
11 ~~as the case may be. The select committee shall report to both~~
12 ~~Houses a concurrent resolution within five calendar days~~
13 ~~(excluding days where either House is not in session) con-~~
14 ~~taining its findings. If both Houses adopt such a resolution~~
15 ~~finding that the committee vote in question was not in~~
16 ~~accordance with the relevant subsection, they shall direct~~
17 ~~that there be made publicly available the entire transcript of~~
18 ~~the meeting improperly closed to the public, or the portion~~
19 ~~or portions of any meeting transcript improperly deleted from~~
20 ~~the publicly available copy, as the case may be.~~
21 ~~"(f) The Select Joint Committee on Meetings shall not~~
22 ~~be subject to the provisions of subsection (a), (b), (c), or~~
23 ~~(d) of this section."~~
24 ~~(b) Title I of the table of contents of the Legislative Re-~~
25 ~~organization Act of 1946 is amended by inserting immedi-~~

1 ~~ately below item 133C, as added by section 101(c) of this~~
2 ~~Act, the following:~~
~~"133D. Open joint and conference committee meetings."~~.
3 ~~SEC. 104. EXERCISE OF RULEMAKING POWERS. The~~
4 ~~provisions of this title are enacted by the Congress—~~
5 ~~(1) as an exercise of the rulemaking power of the~~
6 ~~Senate and the House of Representatives, respectively,~~
7 ~~and as such they shall be considered as part of the rules~~
8 ~~of each House, respectively, or of that House to which~~
9 ~~they specifically apply, and such rules shall supersede~~
10 ~~other rules only to the extent that they are inconsistent~~
11 ~~therewith; and~~
12 ~~(2) with full recognition of the constitutional right~~
13 ~~of either House to change such rules (so far as relating~~
14 ~~to such House) at any time, in the same manner, and to~~
15 ~~the same extent as in the case of any other rule of such~~
16 ~~House.~~
17 ~~TITLE II—AGENCY PROCEDURES~~
18 ~~SEC. 201. (a) This section applies, according to the~~
19 ~~provisions thereof, to any agency, as defined in section 551~~
20 ~~(1) of title 5, United States Code, where the body compris-~~
21 ~~ing the agency consists of two or more members. Except as~~
22 ~~provided in subsection (b), all meetings (including meetings~~
23 ~~to conduct hearings) of such agencies, or a subdivision there-~~
24 ~~of authorized to take action on behalf of the agency, shall be~~

~~open to the public. For purposes of this section, a meeting consists of any procedure by which official agency business is considered or discussed by at least the number of agency members (or of members of a subdivision of the agency authorized to take action on behalf of the agency), required to take action on behalf of the agency.~~

~~(b) Subsection (a) shall not apply to any portion or portions of an agency meeting where the agency determines by a vote of a majority of its entire membership, or, in the case of a subdivision thereof authorized to take action on behalf of the agency, a majority of the membership of such subdivision, that such portion or portions of the meeting—~~

~~(1) will disclose matters necessary to be kept secret in the interests of national defense or the necessarily confidential conduct of the foreign policy of the United States;~~

~~(2) will relate solely to individual agency personnel or to internal agency office management and administration or financial auditing;~~

~~(3) will tend to charge with crime or misconduct, or to disgrace any person, or will represent a clearly unwarranted invasion of the privacy of any individual: *Provided*, That this paragraph shall not apply to any Government officer or employee with respect to his official duties or employment: *And provided further*, That~~

1 ~~as applied to a witness at a meeting this paragraph shall~~
2 ~~not apply unless the witness requests in writing that the~~
3 ~~meeting be closed to the public;~~
4 ~~(4) will disclose information pertaining to any in-~~
5 ~~vestigation conducted for law enforcement purposes, but~~
6 ~~only to the extent that the disclosure would (A) inter-~~
7 ~~fere with enforcement proceedings, (B) deprive a per-~~
8 ~~son of a right to a fair trial or an impartial adjudication,~~
9 ~~(C) disclose the identity of a confidential source and, in~~
10 ~~the case of a record compiled by a criminal law enforce-~~
11 ~~ment authority in the course of a criminal investigation,~~
12 ~~or by an agency conducting a lawful national security~~
13 ~~intelligence investigation, confidential information fur-~~
14 ~~nished only by the confidential source, (D) disclose~~
15 ~~investigative techniques and procedures, (E) endanger~~
16 ~~the life or physical safety of law enforcement personnel;~~
17 ~~or (F) in the case of an agency authorized to regulate~~
18 ~~the issuance or trading of securities, disclose informa-~~
19 ~~tion concerning such securities, or the markets in which~~
20 ~~they are traded, when such information must be kept~~
21 ~~confidential in order to avoid premature speculation in~~
22 ~~the trading of such securities; or~~
23 ~~(5) will disclose information relating to the trade~~
24 ~~secrets or financial or commercial information pertain-~~
25 ~~ing specifically to a given person where—~~

1 ~~(A) a Federal statute requires the information~~
2 ~~to be kept confidential by Government officers and~~
3 ~~employees; or~~
4 ~~(B) the information has been obtained by the~~
5 ~~Federal Government on a confidential basis other~~
6 ~~than through an application by such person for a~~
7 ~~specific Government financial or other benefit and~~
8 ~~the information must be kept secret in order to pre-~~
9 ~~vent grave and irreparable injury to the competitive~~
10 ~~position of such person;~~
11 ~~(6) will relate to the conduct or disposition (but~~
12 ~~not the initiation) of a case of adjudication governed by~~
13 ~~the provisions of the first paragraph of section 554 (a)~~
14 ~~of title 5, United States Code, or of subsection (1),~~
15 ~~(2), (4), (5), or (6) thereof.~~
16 ~~A separate vote of the agency members, or the members of~~
17 ~~a subdivision thereof authorized to take action on behalf of~~
18 ~~the agency, shall be taken with respect to each agency~~
19 ~~meeting a portion or portions of which are proposed to~~
20 ~~be closed to the public pursuant to this subsection. The vote~~
21 ~~of each agency member participating in such vote shall be~~
22 ~~recorded and no proxies shall be allowed. Within one day of~~
23 ~~such vote, the agency shall make publicly available a written~~
24 ~~copy of such vote and, if a meeting or portion thereof is closed~~
25 ~~to the public, a full written explanation of its action.~~

1 ~~(c) Each agency shall make public announcement of~~
2 ~~the date, place, and subject matter of each meeting, and~~
3 ~~whether open or closed to the public, at least one week before~~
4 ~~each meeting. Such announcement shall be made unless the~~
5 ~~agency determines by a vote of the majority of its members,~~
6 ~~or in the case of a subdivision thereof authorized to take~~
7 ~~action on behalf of the agency, a majority of the members of~~
8 ~~the subdivision, that agency business requires that such meet-~~
9 ~~ings be called at an earlier date, in which case the agency~~
10 ~~shall make public announcement of the date, place, and sub-~~
11 ~~ject matter of such meeting, and whether open or closed to~~
12 ~~the public, at the earliest practicable opportunity.~~
13 ~~(d) A complete transcript or electronic recording ad-~~
14 ~~equate to fully record the proceedings shall be made of each~~
15 ~~meeting of each agency (whether open or closed to the pub-~~
16 ~~lic). Except as provided in subsection (e) of this section a~~
17 ~~copy of the transcript or electronic recording of each such~~
18 ~~meeting, together with any official minutes of such meeting,~~
19 ~~shall be made available to the public for inspection, and~~
20 ~~additional copies of any such transcript, minutes, or record-~~
21 ~~ing (or a copy of a transcription of the electronic recording),~~
22 ~~shall be furnished to any person at the actual cost of duplica-~~
23 ~~tion or transcription. Notwithstanding the provisions of sub-~~
24 ~~section (e), in the case of meetings closed to the public,~~
25 ~~the portion of such transcript made available for public~~
26 ~~inspection or electronic recording shall include a list~~

1 ~~of all persons attending and their affiliation, except for any~~
2 ~~portion of such list which would disclose the identity of a~~
3 ~~confidential source, or endanger the life or physical safety~~
4 ~~of law enforcement personnel.~~

5 ~~(c) In the case of meetings closed to the public pursuant~~
6 ~~to subsection (b) of this section, the agency may delete from~~
7 ~~the copies of transcripts, electronic recordings, and minutes~~
8 ~~made available or furnished to the public pursuant to subsec-~~
9 ~~tion (d) of this section, those portions which the agency~~
10 ~~determines by vote of a majority of its membership consist~~
11 ~~of materials specified in paragraph (1), (2), (3), (4),~~
12 ~~(5), or (6) of subsection (b) of this section. A separate~~
13 ~~vote of the agency shall be taken with respect to each tran-~~
14 ~~script, electronic recording, or minutes. The vote of each~~
15 ~~agency member participating in such vote shall be recorded~~
16 ~~and published, and no proxies shall be allowed. In place of~~
17 ~~each portion deleted from copies of the meeting transcript,~~
18 ~~electronic recording, and minutes made available to the pub-~~
19 ~~lic, the agency shall supply a full written explanation of why~~
20 ~~such portion was deleted and a summary of the substance of~~
21 ~~the deleted portion that does not itself disclose information~~
22 ~~specified in paragraph (1), (2), (3), (4), (5), or (6) of~~
23 ~~subsection (b). The agency shall maintain a complete ver-~~
24 ~~batim copy of the transcript, or a complete electronic record-~~
25 ~~ing of each meeting (including those portions deleted from~~

1 ~~copies made available to the public), for a period of at least~~
2 ~~two years after such meeting, or until one year after the con-~~
3 ~~clusion of any proceeding with respect to which the meeting,~~
4 ~~or a portion thereof, was held, whichever occurs later.~~
5 ~~(f) Each agency subject to the requirements of this sec-~~
6 ~~tion shall, within three hundred and sixty days after the en-~~
7 ~~actment of this Act, following consultation with the Ad-~~
8 ~~ministrative Conference of the United States and published~~
9 ~~notice in the Federal Register of at least thirty days and~~
10 ~~opportunity for written comment by any persons, promulgate~~
11 ~~regulations to implement the requirements of subsections (a)~~
12 ~~through (c) inclusive of this section. Such regulations must,~~
13 ~~prior to final promulgation, receive the approval in writing~~
14 ~~of the Assistant Attorney General, office of Legal Counsel,~~
15 ~~certifying that in his opinion the regulations are in accord~~
16 ~~with the requirements of this section. Any citizen or person~~
17 ~~resident in the United States may bring a proceeding in the~~
18 ~~United States Court of Appeals for the District of Columbia~~
19 Circuit—
20 ~~(1) to require an agency to promulgate such regu-~~
21 ~~lations if such agency has not promulgated such regu-~~
22 ~~lations within the time period specified herein; or~~
23 ~~(2) to set aside agency regulations issued pursu-~~
24 ~~ant to this subsection that are not in accord with the~~
25 ~~requirements of subsections (a) through (c) inclusive~~

1 ~~of this section, and to require the promulgation of~~
2 ~~regulations that are in accord with such subsections.~~
3 ~~(g) The district courts of the United States shall have~~
4 ~~jurisdiction to enforce the requirements of subsections (a)~~
5 ~~through (c) inclusive of this section by declaratory judg-~~
6 ~~ment, injunctive relief, or otherwise. Such actions shall~~
7 ~~be brought within sixty days after the meeting whose closing~~
8 ~~is challenged as a violation of this section: *Provided*, That if~~
9 ~~public notice of such meeting was not provided by the agency~~
10 ~~in accordance with the requirements of this section, such~~
11 ~~action shall be brought within sixty days of such meeting~~
12 ~~or such public announcement, whichever is the later. Such~~
13 ~~actions shall be brought against an agency and its members~~
14 ~~by any citizen or person resident in the United States. Such~~
15 ~~actions may be brought in the district wherein the plaintiff~~
16 ~~resides, or has his principal place of business, or where the~~
17 ~~agency in question has its headquarters. In such actions a~~
18 ~~defendant shall serve his answer within twenty days after~~
19 ~~the service of the complaint. The burden is on the agency to~~
20 ~~sustain its action. Except as to causes the court considers~~
21 ~~of greater importance, proceedings before the district court,~~
22 ~~as authorized by this paragraph, take precedence on the~~
23 ~~docket over all other causes and shall be assigned a hearing~~
24 ~~and trial at the earliest practicable date and expedited in~~
25 ~~every way. In deciding such cases the court may examine~~

1 ~~any portion of a meeting transcript or electronic recording~~
2 ~~that was deleted from the publicly available copy and may~~
3 ~~take such additional evidence as it deems necessary. Among~~
4 ~~other forms of equitable relief, including the granting of an~~
5 ~~injunction against future violations of this section, the court~~
6 ~~may require that any portion of a meeting transcript or elec-~~
7 ~~tronic recording improperly deleted from the publicly avail-~~
8 ~~able copy be made publicly available for inspection and copy-~~
9 ~~ing, and, having due regard for orderly administration and~~
10 ~~the public interest, may set aside any agency action taken~~
11 ~~or discussed at an agency meeting improperly closed to the~~
12 ~~public. The jurisdiction of the district courts under this sub-~~
13 ~~section shall be concurrent with that of any other court other-~~
14 ~~wise authorized by law to review agency action. Any such~~
15 ~~court may, at the application of any person otherwise prop-~~
16 ~~erly a party to a proceeding before such court to review an~~
17 ~~agency action, inquire into asserted violations by the agency~~
18 ~~of the requirements of this section and afford the relief au-~~
19 ~~thorized by this section in the case of proceedings by district~~
20 ~~courts.~~
21 ~~(h) In any action brought pursuant to subsection (f)~~
22 ~~or (g) of this section, the reasonable costs of litigation (in-~~
23 ~~cluding reasonable fees for attorneys and expert witnesses)~~
24 ~~may be apportioned to the original parties or their successors~~
25 ~~in interest whenever the court determines such award is ap-~~

~~propriate. In the case of apportionment of costs against an agency or its members, the costs may be assessed by the court against the United States.~~

~~(i) The agencies subject to the requirements of this section shall annually report to Congress regarding their compliance with such requirements, including a tabulation of the total number of agency meetings open to the public, the total number of meetings closed to the public, the reasons for closing such meetings, and a description of any litigation brought against the agency under this section.~~

~~SEC. 202. Title 5 of the United States Code is amended by adding after section 557 the following:~~

~~"EX PARTE COMMUNICATIONS IN AGENCY PROCEEDING~~

~~"SEC. 557A. (a) DEFINITIONS. For purposes of this section—~~

~~"(1) 'Ex parte communication' means a communication relevant to an on-the-record agency proceeding where such communication is not made on the record, or openly at a scheduled hearing session in such proceeding, and reasonable notice thereof is not given to all parties to, or intervenors in, such proceedings.~~

~~"(2) 'Interested person' means any person (including a member or employee of any Government agency or authority) other than a member or employee of the~~

1 ~~agency before which the on-the-record proceeding is~~
2 ~~pending who communicates with an agency member or~~
3 ~~employee with respect to any such on-the-record agency~~
4 ~~proceeding.~~
5 ~~"(3) 'On-the-record agency proceeding' means any~~
6 ~~proceedings before any agency where the agency action,~~
7 ~~or a portion thereof, is required by law to be determined~~
8 ~~on the record after an opportunity for an agency hearing.~~
9 ~~"(b) This section applies to any on-the-record agency~~
10 ~~proceeding.~~
11 ~~"(c) In any agency proceeding which is subject to sub-~~
12 ~~section (b) of this section—~~
13 ~~"(1) no interested person shall make or cause to be~~
14 ~~made to any member of the agency in question, admini-~~
15 ~~trative judge, or employee who is or may be involved in~~
16 ~~the decisional process of the proceeding any ex parte~~
17 ~~communication;~~
18 ~~"(2) no member of the agency in question, admini-~~
19 ~~trative judge, or employee who is or may be involved in~~
20 ~~the decisional process of the proceeding shall make or~~
21 ~~cause to be made to an interested person any ex parte~~
22 ~~communication;~~
23 ~~"(3) a member of the agency in question, admini-~~
24 ~~trative judge, or employee who is or may be involved~~

1 ~~in the decisional process of the proceeding, who receives~~
2 ~~a communication in violation of this subsection, shall~~
3 ~~place in the public record of the proceeding—~~
4 ~~"(A) any written material submitted in viola-~~
5 ~~tion of this subsection; and~~
6 ~~"(B) a memorandum stating the substance of~~
7 ~~each oral communication submitted in violation of~~
8 ~~this subsection; and~~
9 ~~"(C) responses, if any, to the materials de-~~
10 ~~scribed in subparagraphs (A) and (B) of this~~
11 ~~subsection;~~
12 ~~"(4) upon obtaining knowledge of a communica-~~
13 ~~tion in violation of this subsection prompted by or from~~
14 ~~a party or intervenors to any proceeding to which this~~
15 ~~section applies, the agency members or member, the~~
16 ~~administrative judge, or employee presiding at the hear-~~
17 ~~ings may, to the extent consistent with the interests of~~
18 ~~justice and the policy of the underlying statutes, require~~
19 ~~the party or intervenors to show cause why his claim~~
20 ~~or interest in the proceeding should not be dismissed,~~
21 ~~denied, disregarded, or otherwise adversely affected by~~
22 ~~virtue of such violation.~~
23 ~~"(d) The prohibitions of this section shall not apply—~~
24 ~~"(1) to any proceeding to the extent required for~~
25 ~~the disposition of ex parte matters as authorized by law;~~

1 "~~(2) to any written communication from persons~~
2 ~~who are neither parties or intervenors to the proceeding,~~
3 ~~nor government officials acting in their official capacity,~~
4 ~~where such communications are promptly placed in the~~
5 ~~public docket file of the proceedings.~~
6 "~~(c) The prohibitions of this section shall apply at~~
7 ~~such time as the agency shall designate, having due regard~~
8 ~~for the public interest in open decisionmaking by agencies,~~
9 ~~but in no case shall they apply later than the time at which a~~
10 ~~proceeding is noticed for hearing. If the person responsible~~
11 ~~for the communication has knowledge that the proceeding~~
12 ~~will be noticed, the prohibitions of this section shall apply at~~
13 ~~the time of his acquisition of such knowledge. In the case of~~
14 ~~any person who files with an agency any application, petition,~~
15 ~~or other form of request for agency action, the prohibitions~~
16 ~~of this section shall apply, with respect to communications~~
17 ~~with such person, commencing at the time of such filing or~~
18 ~~at the time otherwise provided by this subsection, whichever~~
19 ~~occurs first.~~
20 "~~(f) Every agency notice of an opportunity for partici-~~
21 ~~pation by interested persons in a hearing shall contain a~~
22 ~~statement as follows:~~
23 "~~(1) if such notice relates to an on-the-record~~
24 ~~agency proceeding, it shall state that the proceeding is~~
25 ~~subject to the provisions of this section with respect~~
26 ~~to ex parte communications;~~

1 "~~(2) if such notice relates to an agency proceeding~~
2 ~~not on the record, it shall state that the proceeding is not~~
3 ~~subject to the provisions of this section with respect to~~
4 ~~ex parte communications.~~
5 ~~If a notice of hearing with respect to any proceeding before~~
6 ~~an agency fails to comply with this section, the proceeding~~
7 ~~shall be deemed to be an on-the-record agency proceeding for~~
8 ~~purposes of ex parte communications.~~
9 "~~(g) Each agency subject to the requirements of this~~
10 ~~section shall, within three hundred and sixty days after the~~
11 ~~enactment of this section, following consultation with the~~
12 ~~Administrative Conference of the United States and pub-~~
13 ~~lished notice in the Federal Register of at least thirty days~~
14 ~~and opportunity for written comment, promulgate regulations~~
15 ~~to implement the requirements of this section. Any citizen or~~
16 ~~person resident in the United States may bring a proceeding~~
17 ~~in the United States Court of Appeals for the District of~~
18 ~~Columbia Circuit—~~
19 "~~(1) to require any agency to promulgate regula-~~
20 ~~tions if the agency has not promulgated such regulations~~
21 ~~within the time period specified; or~~
22 "~~(2) to set aside agency regulations issued pursuant~~
23 ~~to this subsection that are not in accord with the require-~~
24 ~~ments of this section, and to require the promulgation~~
25 ~~of regulations that are in accord with this section.~~

1 "~~(h) Nothing in this section shall be construed to per-~~
2 ~~mit any communication which is prohibited by any other~~
3 ~~provision of law, or to prohibit any agency from adopting,~~
4 ~~by rule or otherwise, prohibitions or regulations governing~~
5 ~~ex parte communications which are additional to, or more~~
6 ~~stringent than, the requirements of this section.~~
7 "~~(i) The district courts of the United States shall have~~
8 ~~jurisdiction to enforce the requirements of subsections (c)~~
9 ~~and (e) of this section by declaratory judgment, injunctive~~
10 ~~relief, or otherwise. The action may be brought by any~~
11 ~~citizen of or person resident in the United States. The~~
12 ~~action shall be brought in the district wherein the plaintiff~~
13 ~~resides or has his principal place of business, or where the~~
14 ~~agency in question has its headquarters. Where a person~~
15 ~~other than an agency, agency member, administrative judge,~~
16 ~~or employee is alleged to have participated in a violation of~~
17 ~~the requirements of this section, such person may, but need~~
18 ~~not, be joined as a party defendant; for purposes of joining~~
19 ~~such person as a party defendant, service may be had on~~
20 ~~such person in any district. Among other forms of equitable~~
21 ~~relief, the court may require that any ex parte communica-~~
22 ~~tion made or received in violation of the requirements of this~~
23 ~~section be published, and, having due regard for orderly~~
24 ~~administration and the public interest, may set aside any~~
25 ~~agency action taken in a proceeding where the violation~~

~~occurred. The jurisdiction of the district courts under this subsection shall be concurrent with that of any other court otherwise authorized by law to review agency action. Any such court may, at the application of any person otherwise properly a party to a proceeding before such court to review an agency action, inquire into asserted violations by the agency of the requirements of this section, and afford the relief authorized by this section in the case of proceedings by district courts.~~

~~"(j) In any action brought pursuant to subsection (g) and (i) of this section, cost of litigation (including reasonable fees for attorneys and expert witnesses) may be apportioned to the original parties or their successors in interest whenever the court determines such award is appropriate."~~

~~SEC. 203. This title and the amendments made by this title do not authorize withholding of information or limit the availability of records to the public except as provided in this title. This title does not authorize any information to be withheld from Congress.~~

SECTION 1. SHORT TITLE.—This Act may be cited as the "Government in the Sunshine Act".

SEC. 2. DECLARATION OF POLICY.—It is hereby declared to be the policy of the United States that the public is entitled to the fullest practicable information regarding the decisionmaking processes of the Federal Government.

1 *It is the purpose of this Act to provide the public with such*
2 *information, while protecting the rights of individuals and*
3 *the ability of the Government to carry out its responsibilities.*
4 *SEC. 3. DEFINITIONS.—For purposes of this Act the*
5 *term, "person" includes an individual, partnership, cor-*
6 *poration, association, or public or private organization other*
7 *than an agency.*

8 *TITLE I—CONGRESSIONAL PROCEDURES*

9 *SEC. 101. SENATE COMMITTEE MEETINGS.—(a) The*
10 *Legislative Reorganization Act of 1946 is amended—*
11 *(1) by striking out the first sentence of section*
12 *133(b);*
13 *(2) by adding after section 133B the following:*
14 *"OPEN SENATE COMMITTEE MEETINGS*
15 *"SEC. 133C. Each meeting of a standing, select, or*
16 *special committee of the Senate, or any subcommittee thereof,*
17 *shall be open to the public, except that a portion or portions*
18 *of any such meeting may be closed to the public if the commit-*
19 *tee or subcommittee, as the case may be, determines by record*
20 *vote of a majority of the members of the committee or sub-*
21 *committee present that the matters to be discussed at such*
22 *portion or portions—*
23 *"(1) will disclose matters necessary to be kept secret*
24 *in the interests of national defense or the foreign policy*
25 *of the United States;*

"(2) will relate solely to matters of committee staff personnel or internal staff management or procedure;

"(3) will tend to charge an individual with crime or misconduct, to disgrace or injure the professional standing of an individual, or otherwise to expose an individual to public contempt or obloquy, or will represent a clearly unwarranted invasion of the privacy of an individual;

"(4) will disclose the identity of any informer or law enforcement agent or will disclose any information relating to the investigation or prosecution of any violation of law that is required to be kept secret in the interests of effective law enforcement; or

"(5) will disclose information relating to the trade secrets or financial or commercial information pertaining specifically to a given person if—

"(A) an Act of Congress requires the information to be kept confidential by Government officers and employees; or

"(B) the information has been obtained by the Government on a confidential basis, and is required to be kept secret in order to prevent undue injury to the competitive position of such person.

This section shall not apply to meetings to conduct hearings.".

(b) Paragraph 7(b) of Rule XXV of the Standing Rules of the Senate is repealed.

1 *(c) Title I of the table of contents of the Legislative*
2 *Reorganization Act of 1946 is amended by inserting imme-*
3 *diately below item 133B the following:*

"133C. Open Senate committee meetings.".

4 *SEC. 102. HOUSE OF REPRESENTATIVES COMMITTEE*
5 *MEETINGS.—Clause 2(g)(1) of Rule XI of the Rules of the*
6 *House of Representatives is amended to read as follows:*
7 *"(g)(1) Each meeting of a standing, select, or spe-*
8 *cial committee or subcommittee, shall be open to the public,*
9 *except that a portion or portions of any such meeting may be*
10 *closed to the public if the committee or subcommittee, as the*
11 *case may be, determines by record vote of a majority of the*
12 *members of the committee or subcommittee present that the*
13 *matters to be discussed at such portion or portions—*
14 *"(A) will disclose matters necessary to be kept*
15 *secret in the interests of national defense or the foreign*
16 *policy of the United States;*
17 *"(B) will relate solely to matters of committee staff*
18 *personnel or internal staff management or procedure;*
19 *"(C) will tend to charge an individual with crime*
20 *or misconduct, to disgrace or injure the professional*
21 *standing of an individual, or otherwise to expose an in-*
22 *dividual to public contempt or obloquy, or will represent*
23 *a clearly unwarranted invasion of the privacy of an in-*
24 *dividual;*

"(D) will disclose the identity of any informer or law enforcement agent or will disclose any information relating to the investigation or prosecution of any violation of law that is required to be kept secret in the interests of effective law enforcement; or

"(E) will disclose information relating to the trade secrets or financial or commercial information pertaining specifically to a given person if—

"(i) an Act of Congress requires the information to be kept confidential by Government officers and employees; or

"(ii) the information has been obtained by the Government on a confidential basis, and is required to be kept secret in order to prevent undue injury to the competitive position of such person. This clause shall not apply to meetings to conduct hearings.".

SEC. 103. (a) CONFERENCE COMMITTEES.—The Legislative Reorganization Act of 1946 is amended by inserting after section 133C, as added by section 101(a) of this Act, the following new section:

"OPEN CONFERENCE COMMITTEE MEETINGS

"SEC. 133D. Each conference committee between the Senate and the House of Representatives shall be open to the public except when the managers of either the Senate

1 *secret in the interests of national defense or the foreign*
2 *policy of the United States;*
3 *"(2) will relate solely to matters of committee staff*
4 *personnel or internal staff management or procedure;*
5 *"(3) will tend to charge an individual with crime*
6 *or misconduct, to disgrace or injure the professional*
7 *standing of an individual, or otherwise to expose an*
8 *individual to public contempt or obloquy, or will represent*
9 *a clearly unwarranted invasion of the privacy of an*
10 *individual;*
11 *"(4) will disclose the identity of any informer or*
12 *law enforcement agent or will disclose any information*
13 *relating to the investigation or prosecution of any viola-*
14 *tion of law that is required to be kept secret in the in-*
15 *terests of effective law enforcement; or*
16 *"(5) will disclose information relating to the trade*
17 *secrets or financial or commercial information pertaining*
18 *specifically to a given person if—*
19 *"(A) an Act of Congress requires the informa-*
20 *tion to be kept confidential by Government officers*
21 *and employees; or*
22 *"(B) the information has been obtained by the*
23 *Government on a confidential basis, and is required*
24 *to be kept secret in order to prevent undue injury to*
25 *the competitive position of such person.*

1 *or the House of Representatives in open session determine,*
2 *by a rollcall vote of a majority of those managers present,*
3 *that all or part of the remainder of the meeting on the day*
4 *of the vote shall be closed to the public.".*

5 *(b) Title I of the table of contents of the Legislative Re-*
6 *organization Act of 1946 is amended by inserting immedi-*
7 *ately below item 133C, as added by section 101(c) of this*
8 *Act, the following:*

"133D. Open conference committee meetings.".

9 *SEC. 104. (a) JOINT COMMITTEES.—The Legislative*
10 *Reorganization Act of 1946 is amended by inserting after*
11 *section 133D, as added by section 102(a) of this Act, the*
12 *following new section:*

13 *"OPEN JOINT COMMITTEE MEETINGS*

14 *"SEC. 133E. Each meeting of a joint committee of the*
15 *Senate and House of Representatives, or any subcommittee*
16 *thereof, shall be open to the public, except that a portion or*
17 *portions of any such meeting may be closed to the public if*
18 *the committee or subcommittee, as the case may be, determines*
19 *by record vote of a majority of the members of the committee*
20 *or subcommittee present that the matters to be discussed or*
21 *the testimony to be taken at such portion or portions—*

22 *"(1) will disclose matters necessary to be kept*

1 *This section shall not apply to meetings to conduct hear-*
2 *ings.".*

3 *(b) Title I of the table of contents of the Legislative Re-*
4 *organization Act of 1946 is amended by inserting immedi-*
5 *ately below item 133D, as added by section 103(b) of this*
6 *Act, the following:*

"133E. Open joint committee meetings.".

7 *SEC. 105. EXERCISE OF RULEMAKING POWERS.—The*
8 *provisions of this title are enacted by the Congress—*

9 *(1) as an exercise of the rulemaking power of the*
10 *Senate and the House of Representatives, respectively,*
11 *and as such they shall be considered as part of the rules*
12 *of each House, respectively, or of that House to which*
13 *they specifically apply, and such rules shall supersede*
14 *other rules only to the extent that they are inconsistent*
15 *therewith; and*

16 *(2) with full recognition of the constitutional right*
17 *of either House to change such rules (so far as relating*
18 *to such House) at any time, in the same manner, and to*
19 *the same extent as in the case of any other rule of such*
20 *House.*

21 *TITLE II—AGENCY PROCEDURES*

22 *SEC. 201. (a) This section applies, according to the*
23 *provisions thereof, to the Federal Election Commission and*
24 *to any agency, as defined in section 551(1) of title 5, United*

1 *States Code, where the collegial body comprising the agency*
2 *consists of two or more individual members, at least a major-*
3 *ity of whom are appointed to such position by the President*
4 *with the advice and consent of the Senate. Except as provided*
5 *in subsection (b), all meetings of such collegial body, or of*
6 *a subdivision thereof authorized to take action on behalf of*
7 *the agency, shall be open to the public. For purposes of this*
8 *section, a meeting means the deliberations of at least the*
9 *number of individual agency members required to take action*
10 *on behalf of the agency where such deliberations concern the*
11 *joint conduct or disposition of official agency business.*
12 *(b) Except where the agency finds that the public in-*
13 *terest requires otherwise, (1) subsection (a) shall not apply*
14 *to any agency meeting, or any portion of an agency meeting,*
15 *or to any meeting, or any portion of a meeting, of a sub-*
16 *division thereof authorized to take action on behalf of the*
17 *agency, and, (2) the requirements of subsections (c) and*
18 *(d) shall not apply to any information pertaining to such*
19 *meeting otherwise required by this section to be disclosed to*
20 *the public, where the agency, or the subdivision thereof con-*
21 *ducting the meeting, properly determines that such portion*
22 *or portions of its meeting, or such information, can be reason-*
23 *ably expected to—*
24 *(1) disclose matters (A) specifically authorized*
25 *under criteria established by an Executive order to be*

1 *kept secret in the interests of national defense or foreign*
2 *policy and (B) are in fact properly classified pursuant*
3 *to such Executive order;*
4 *(2) relate solely to the agency's own internal*
5 *personnel rules and practices;*
6 *(3) disclose information of a personal nature*
7 *where disclosure would constitute a clearly unwarranted*
8 *invasion of personal privacy;*
9 *(4) involve accusing any person of a crime, or*
10 *formally censuring any person;*
11 *(5) disclose information contained in investi-*
12 *gatory records compiled for law enforcement purposes,*
13 *but only to the extent that the disclosure would (A)*
14 *interfere with enforcement proceedings, (B) deprive*
15 *a person of a right to a fair trial or an impartial*
16 *adjudication, (C) constitute an unwarranted invasion*
17 *of personal privacy, (D) disclose the identity of a con-*
18 *fidential source, (E) in the case of a record compiled*
19 *by a criminal law enforcement authority in the course*
20 *of a criminal investigation, or by an agency conducting*
21 *a lawful national security intelligence investigation, dis-*
22 *close confidential information furnished only by the confi-*
23 *dential source, (F) disclose investigative techniques and*
24 *procedures, or (G) endanger the life or physical safety*
25 *of law enforcement personnel;*

1 *(6) disclose trade secrets, or financial or com-*
2 *mercial information obtained from any person, where*
3 *such trade secrets or other information could not be ob-*
4 *tained by the agency without a pledge of confidentiality,*
5 *or where such information must be withheld from the*
6 *public in order to prevent substantial injury to the com-*
7 *petitive position of the person to whom such information*
8 *relates;*
9 *(7) disclose information which must be withheld*
10 *from the public in order to avoid premature disclosure of*
11 *an action or a proposed action by—*
12 *(A) an agency which regulates currencies,*
13 *securities, commodities, or financial institutions*
14 *where such disclosure would (i) lead to serious*
15 *financial speculation in currencies, securities, or*
16 *commodities, or (ii) seriously endanger the stability*
17 *of any financial institution;*
18 *(B) any agency where such disclosure would*
19 *seriously frustrate implementation of the proposed*
20 *agency action, or private action contingent thereon;*
21 *or*
22 *(C) any agency relating to the purchase by*
23 *such agency of real property.*
24 *This paragraph shall not apply in any instance where*
25 *the agency has already disclosed to the public the con-*

1 *tent or nature of its proposed action, or where the agency*
2 *is required by law to make such disclosure on its own*
3 *initiative prior to taking final agency action on such*
4 *proposal;*
5 *(8) disclose information contained in or related to*
6 *examination, operating, or condition reports prepared by,*
7 *on behalf of, or for the use of an agency responsible*
8 *for the regulation or supervision of financial institutions;*
9 *(9) specifically concern the agency's participation*
10 *in a civil action in Federal or State court, or the initia-*
11 *tion, conduct, or disposition by the agency of a particular*
12 *case of formal agency adjudication pursuant to the proce-*
13 *dures in section 554 of title 5, United States Code, or*
14 *otherwise involving a determination on the record after*
15 *opportunity for a hearing; or*
16 *(10) disclose information required to be withheld*
17 *from the public by any other statute establishing particu-*
18 *lar criteria or referring to particular types of*
19 *information.*
20 *(c)(1) Action under subsection (b) shall be taken only*
21 *when a majority of the entire membership of the agency, or*
22 *of the subdivision thereof authorized to conduct the meeting*
23 *on behalf of the agency, votes to take such action. A separate*
24 *vote of the agency members, or the members of a subdivision*
25 *thereof, shall be taken with respect to each agency meeting a*

1 *portion or portions of which are proposed to be closed to the*
2 *public pursuant to subsection (b), or with respect to any*
3 *information which is proposed to be withheld under subsec-*
4 *tion (b). A single vote may be taken with respect to a series*
5 *of meetings, a portion or portions of which are proposed to*
6 *be closed to the public, or with respect to any information*
7 *concerning such series of meetings, so long as each meeting in*
8 *such series involves the same particular matters, and is*
9 *scheduled to be held no more than thirty days after the initial*
10 *meeting in such series. The vote of each agency member par-*
11 *ticipating in such vote shall be recorded and no proxies shall*
12 *be allowed. Whenever any person whose interests may be*
13 *directly affected by a meeting requests that the agency close*
14 *a portion or portions of the meeting to the public for any of*
15 *the reasons referred to in paragraphs (3), (4), or (5) of*
16 *subsection (b), the agency shall vote whether to close such*
17 *meeting, upon request of any one of its members. Within one*
18 *day of any vote taken pursuant to this paragraph, the agency*
19 *shall make publicly available a written copy of such vote.*
20 *(2) If a meeting or portion thereof is closed to the*
21 *public, the agency shall, within one day of the vote taken*
22 *pursuant to paragraph (1) of this subsection, make publicly*
23 *available a full written explanation of its action closing the*
24 *meeting, or portion thereof, together with a list of all persons*
25 *expected to attend the meeting, and their affiliation.*

1 *(3) Any agency, a majority of whose meetings will*
2 *properly be closed to the public, in whole or in part, pursuant*
3 *to paragraphs (6), (7)(A), (8), or (9) of subsection (b),*
4 *or any combination thereof, may provide by regulation for*
5 *the closing of such meetings, or portion of such meetings, so*
6 *long as a majority of the members of the agency, or of the*
7 *subdivision thereof conducting the meeting, votes at the begin-*
8 *ning of such meeting, or portion thereof, to close the meeting,*
9 *and a copy of such vote is made available to the public. The*
10 *provisions of this subsection, and subsection (d), shall not*
11 *apply to any meeting to which such regulations apply: Pro-*
12 *vided, That the agency shall, except to the extent that the*
13 *provisions of subsection (b) may apply, provide the public*
14 *with public announcement of the date, place, and subject mat-*
15 *ter of the meeting at the earliest practicable opportunity.*
16 *(d) In the case of each meeting, the agency shall make*
17 *public announcement, at least one week before the meeting,*
18 *of the date, place, and subject matter of the meeting, whether*
19 *open or closed to the public, and the name and phone number*
20 *of the official designated by the agency to respond to requests*
21 *for information about the meeting. Such announcement*
22 *shall be made unless a majority of the members of the agency.*
23 *or of the members of the subdivision thereof conducting the*
24 *meeting, determines by a vote that agency business requires*
25 *that such meetings be called at an earlier date, in which case*

1 *the agency shall make public announcement of the date, place,*
2 *and subject matter of such meeting, and whether open or*
3 *closed to the public, at the earliest practicable opportunity.*
4 *The subject matter of a meeting, or the determination of the*
5 *agency to open or close a meeting, or portion of a meeting,*
6 *to the public, may be changed following the public announce-*
7 *ment required by this paragraph if, (1) a majority of the*
8 *entire membership of the agency, or of the subdivision*
9 *thereof conducting the meeting, determines by a vote that*
10 *agency business so requires, and that no earlier announce-*
11 *ment of the change was possible, and, (2) the agency pub-*
12 *licly announces such change at the earliest practicable oppor-*
13 *tunity. Immediately following the public announcement re-*
14 *quired by this paragraph, notice of such announcement shall*
15 *also be submitted for publication in the Federal Register.*
16 *(e) A complete transcript or electronic recording ade-*
17 *quate to fully record the proceedings shall be made of each*
18 *meeting, or portion of a meeting, closed to the public, ex-*
19 *cept for a meeting, or portion of a meeting, closed to the*
20 *public pursuant to paragraph (9) of subsection (b). The*
21 *agency shall make promptly available to the public, in a place*
22 *easily accessible to the public, the complete transcript or elec-*
23 *tronic recording of the discussion at such meeting of any*
24 *item on the agenda, or of the testimony of any witness re-*
25 *ceived at such meeting, where no significant portion of such*

1 *discussion or testimony contains any information specified*
2 *in paragraphs (1) through (10) of subsection (b). Copies*
3 *of such transcript, or a transcription of such electronic re-*
4 *cording disclosing the identity of each speaker, shall be fur-*
5 *nished to any person at the actual cost of duplication or*
6 *transcription. The agency shall maintain a complete ver-*
7 *batim copy of the transcript, or a complete electronic record-*
8 *ing of each meeting, or portion of a meeting, closed to the*
9 *public, for a period of at least two years after such meeting,*
10 *or until one year after the conclusion of any agency pro-*
11 *ceeding with respect to which the meeting, or a portion thereof,*
12 *was held, whichever occurs later.*
13 *(f) Each agency subject to the requirements of this sec-*
14 *tion shall, within one hundred and eighty days after the en-*
15 *actment of this Act, following consultation with the Office of*
16 *the Chairman of the Administrative Conference of the United*
17 *States and published notice in the Federal Register of at least*
18 *thirty days and opportunity for written comment by any*
19 *persons, promulgate regulations to implement the require-*
20 *ments of subsections (a) through (e) of this section. Any*
21 *person may bring a proceeding in the United States Dis-*
22 *trict Court for the District of Columbia to require an agency*
23 *to promulgate such regulations if such agency has not pro-*
24 *mulgated such regulations within the time period specified*
25 *herein. Any person may bring a proceeding in the United*

80-459 O - 77 - 13

1 *States Court of Appeals for the District of Columbia to set*
2 *aside agency regulations issued pursuant to this subsection*
3 *that are not in accord with the requirements of subsections (a)*
4 *through (e) of this section, and to require the promulga-*
5 *tion of regulations that are in accord with such subsections.*
6 *(g) The district courts of the United States have juris-*
7 *diction to enforce the requirements of subsections (a) through*
8 *(e) of this section by declaratory judgment, injunctive relief,*
9 *or other relief as may be appropriate. Such actions may be*
10 *brought by any person against an agency or its members*
11 *prior to, or within sixty days after, the meeting out of which*
12 *the violation of this section arises, except that if public an-*
13 *nouncement of such meeting is not initially provided by the*
14 *agency in accordance with the requirements of this section,*
15 *such action may be instituted pursuant to this section at any*
16 *time prior to sixty days after any public announcement of*
17 *such meeting. Before bringing such action, the plaintiff*
18 *shall first notify the agency of his intent to do so, and allow*
19 *the agency a reasonable period of time, not to exceed ten*
20 *days, to correct any violation of this section, except that*
21 *such reasonable period of time shall not be held to exceed*
22 *two working days where notification of such violation is*
23 *made prior to a meeting which the agency has voted to close.*
24 *Such actions may be brought in the district wherein the*
25 *plaintiff resides, or has his principal place of business, or*

1 *where the agency in question has its headquarters. In such*
2 *actions a defendant shall serve his answer within twenty days*
3 *after the service of the complaint. The burden is on the*
4 *defendant to sustain his action. In deciding such cases the*
5 *court may examine in camera any portion of a transcript or*
6 *electronic recording of a meeting closed to the public, and*
7 *may take such additional evidence as it deems necessary. The*
8 *court, having due regard for orderly administration and the*
9 *public interest, as well as the interests of the party, may*
10 *grant such equitable relief as it deems appropriate, includ-*
11 *ing granting an injunction against future violations of this*
12 *section, or ordering the agency to make available to the public*
13 *the transcript or electronic recording of any portion of a*
14 *meeting improperly closed to the public. Except to the extent*
15 *provided in subsection (h) of this section, nothing in this sec-*
16 *tion confers jurisdiction on any district court to set aside*
17 *or invalidate any agency action taken or discussed at an*
18 *agency meeting out of which the violation of this section*
19 *arose.*

20 *(h) Any Federal court otherwise authorized by law to*
21 *review agency action may, at the application of any person*
22 *properly participating in the proceeding pursuant to other*
23 *applicable law, inquire into violations by the agency of the*
24 *requirements of this section, and afford any such relief as it*
25 *deems appropriate.*

1 *(i) The court may assess against any party reason-*
2 *able attorney fees and other litigation costs reasonably in-*
3 *curred by any other party who substantially prevails in any*
4 *action brought in accordance with the provisions of sub-*
5 *section (f), (g), or (h) of this section. Costs may be*
6 *assessed against an individual member of an agency only in*
7 *the case where the court finds such agency member has*
8 *intentionally and repeatedly violated this section, or against*
9 *the plaintiff where the court finds that the suit was initiated*
10 *by the plaintiff for frivolous or dilatory purposes. In the*
11 *case of apportionment of costs against an agency, the costs*
12 *may be assessed by the court against the United States.*
13 *(j) The agencies subject to the requirements of this*
14 *section shall annually report to Congress regarding their*
15 *compliance with such requirements, including a tabulation*
16 *of the total number of agency meetings open to the public,*
17 *the total number of meetings closed to the public, the rea-*
18 *sons for closing such meetings, and a description of any*
19 *litigation brought against the agency under this section.*
20 *Sec. 202. (a) Section 557 of title 5, United States*
21 *Code, is amended by adding at the end thereof the following*
22 *new subsection:*
23 *"(d) In any agency proceeding which is subject to sub-*
24 *section (a) of this section, except to the extent required for*
25 *the disposition of ex parte matters as authorized by law—*

1 *"(1) no interested person outside the agency shall*
2 *make or knowingly cause to be made to any member of*
3 *the body comprising the agency, administrative law*
4 *judge, or other employee who is or may reasonably be*
5 *expected to be involved in the decisional process of the*
6 *proceeding, an ex parte communication relevant to the*
7 *merits of the proceeding;*
8 *"(2) no member of the body comprising the agency,*
9 *administrative law judge, or other employee who is or*
10 *may reasonably be expected to be involved in the decisional*
11 *process of the proceeding, shall make or knowingly*
12 *cause to be made to an interested person outside the*
13 *agency an ex parte communication relevant to the merits*
14 *of the proceeding;*
15 *"(3) a member of the body comprising the agency,*
16 *administrative law judge, or other employee who is or*
17 *may reasonably be expected to be involved in the deci-*
18 *sional process of such proceeding who receives, or who*
19 *makes, a communication in violation of this subsection,*
20 *shall place on the public record of the proceeding:*
21 *"(A) written communications transmitted in*
22 *violation of this subsection;*
23 *"(B) memorandums stating the substance of all*
24 *oral communications occurring in violation of this*
25 *subsection; and*

1 *"(C) responses to the materials described in sub-*
2 *paragraphs (A) and (B) of this subsection;*
3 *"(4) upon receipt of a communication knowingly*
4 *made by a party, or which was knowingly caused to be*
5 *made by a party in violation of this subsection; the*
6 *agency, administrative law judge, or other employee*
7 *presiding at the hearing may, to the extent consistent*
8 *with the interests of justice and the policy of the under-*
9 *lying statutes, require the person or party to show cause*
10 *why his claim or interest in the proceeding should not*
11 *be dismissed, denied, disregarded, or otherwise adversely*
12 *affected by virtue of such violation;*
13 *"(5) the prohibitions of this subsection shall apply*
14 *at such time as the agency may designate, but in no case*
15 *shall they apply later than the time at which a proceeding*
16 *is noticed for hearing unless the person responsible for*
17 *the communication has knowledge that it will be noticed,*
18 *in which case the prohibitions shall apply at the time of*
19 *his acquisition of such knowledge.".*
20 *(b) The second sentence of section 554(d) of title 5,*
21 *United States Code, is amended to read as follows: "Such*
22 *employee may not be responsible to or subject to the super-*
23 *vision or direction of an employee or agent engaged in the*
24 *performance of investigative or prosecuting functions for an*
25 *agency.".*

1 *(c) Section 551 of title 5, United States Code, is*
2 *amended—*
3 *(1) by striking out "and" at the end of paragraph*
4 *(12);*
5 *(2) by striking out the "act." at the end of para-*
6 *graph (13) and inserting in lieu thereof "act; and".*
7 *(3) by adding at the end thereof the following new*
8 *paragraph:*
9 *"(14) 'ex parte communication' means an oral or*
10 *written communication not on the public record with*
11 *respect to which reasonable prior notice to all parties is*
12 *not given.".*
13 *(d) Section 556(d) of title 5, United States Code, is*
14 *amended by inserting between the third and fourth sentences*
15 *thereof the following new sentence: "The agency may, to the*
16 *extent consistent with the interests of justice and the policy*
17 *of the underlying statutes administered by the agency, con-*
18 *sider a violation of section 557(d) of this title sufficient*
19 *grounds for a decision adverse to a party who has knowingly*
20 *committed such violation or knowingly caused such violation*
21 *to occur.".*
22 *SEC. 203. (a) Except as specifically provided by section*
23 *201, nothing in section 201 confers any additional rights*
24 *on any person, or limits the present rights of any such*
25 *person, to inspect or copy, under section 552 of title 5,*

1 *United States Code, any documents or other written ma-*
2 *terial within the possession of any agency. In the case of*
3 *any request made pursuant to section 552 of title 5,*
4 *United States Code, to copy or inspect the transcripts*
5 *or electronic recordings described in section 201(e),*
6 *the provisions of this Act shall govern whether such tran-*
7 *scripts or electronic recordings shall be made available in*
8 *accordance with such request. The requirements of chapter*
9 *33, of title 44, United States Code, shall not apply to the*
10 *transcripts and electronic recordings described in section 201*
11 *(e). This title does not authorize any information to be with-*
12 *held from Congress.*
13 *(b) Nothing in section 201 authorizes any agency to*
14 *withhold from any individual any record, including tran-*
15 *scripts or electronic recordings required by this Act, which*
16 *is otherwise accessible to that individual under section 552a*
17 *of title 5, United States Code.*
18 *SEC. 204. The provisions of this title shall become ef-*
19 *fective one hundred and eighty days after the date on which*
20 *this Act is enacted, except that the provisions of section 201*
21 *requiring the issuance of regulations to implement such sec-*
22 *tion shall become effective upon enactment.*

Calendar No. 343

94TH CONGRESS 1st Session | SENATE | REPORT No. 94-354

GOVERNMENT IN THE SUNSHINE ACT

REPORT

OF THE

COMMITTEE ON GOVERNMENT OPERATIONS UNITED STATES SENATE

TO ACCOMPANY

S. 5

TO PROVIDE THAT MEETINGS OF GOVERNMENT AGENCIES AND OF CONGRESSIONAL COMMITTEES SHALL BE OPEN TO THE PUBLIC, AND FOR OTHER PURPOSES

JULY 31, 1975.—Ordered to be printed

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1975

57-010

COMMITTEE ON GOVERNMENT OPERATIONS

ABRAHAM RIBICOFF, Connecticut, *Chairman*

JOHN L. McCLELLAN, Arkansas
HENRY M. JACKSON, Washington
EDMUND S. MUSKIE, Maine
LEE METCALF, Montana
JAMES B. ALLEN, Alabama
LAWTON CHILES, Florida
SAM NUNN, Georgia
JOHN GLENN, Ohio

CHARLES H. PERCY, Illinois
JACOB K. JAVITS, New York
WILLIAM V. ROTH, Jr., Delaware
BILL BROCK, Tennessee
LOWELL P. WEICKER, Jr., Connecticut

RICHARD A. WEGMAN, *Chief Counsel and Staff Director*
PAUL HOFF, *Counsel*
PAUL L. LEVENTHAL, *Counsel*
ELI E. NOBLEMAN, *Counsel*
MATTHEW SCHNEIDER, *Counsel*
JOHN B. CHILDERS, *Chief Counsel to the Minority*
BRIAN CONBOY, *Special Counsel to the Minority*
STEVEN HOROWITZ, *Staff Assistant*
MARILYN A. HARRIS, *Chief Clerk*
ELIZABETH A. PREAST, *Assistant Chief Clerk*
HAROLD C. ANDERSON, *Staff Editor*

CONTENTS

	Page
Summary of Legislation	1
Open Congressional Meetings	2
Open Agency Meetings	2
Ex Parte Contacts	3
Background and Purpose of the Legislation	4
History of Legislation	9
Section-by-Section Analysis	11
Introductory Sections	11
Title I—Congressional Procedures	11
Section 101—Senate Committees	11
Section 102—House Committees	13
Section 103—Conference Committees	14
Section 104—Joint Committees	14
Section 105—Exercise of Rulemaking Powers	14
Title II—Agency Procedures	15
Section 201—Open Meetings	15
Agencies included	15
Definition of meeting	18
Effect of subsection 201(a)	19
Section 202—Prohibition of Ex Parte Communications	35
Section 203—Effect on Other Laws	39
Section 204—Effective Date	40
Estimated Cost of Legislation	40
Role Call Vote in Committee	41
Changes in Existing Law	41
Legislative Reorganization Act of 1946 as amended through March 7, 1975	41
Title I—Changes in Rules of Senate and House	42
Chapter 5, Title 5, U.S. Code	44
Rules of the House of Representatives	46
Appendix	49
Summary of State Open Meetings Laws	50
Text of S. 5 as reported	53

Calendar No 343

94TH CONGRESS 1st Session | SENATE | REPORT No. 94–354

GOVERNMENT IN THE SUNSHINE ACT

JULY 31, 1975.—Ordered to be printed

Mr. CHILES, from the Committee on Government Operations, submitted the following

REPORT

[To accompany S. 5]

The Committee on Government Operations, to which was referred the bill (S. 5) to provide that meetings of Government agencies and of congressional committees shall be open to the public, and for other purposes, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

SUMMARY OF THE LEGISLATION

S. 5, the "Government in the Sunshine Act," is founded on the proposition that the government should conduct the public's business in public. The bill requires congressional committees and all Federal agencies subject to the legislation to conduct their meetings in the open, rather than behind closed doors. As a result of this legislation, the public will, for the first time, have the right to observe most of the meetings held by all congressional committees, and by 47 Federal agencies.

The bill also establishes for the first time a clear, statutory prohibition against private ex parte communications between agencies and outside parties on matters being adjudicated by the agency. This provision assures that decisions required by law to be made solely on the basis of a public record will not be influenced by secret discussions that some of the parties to the proceeding, or the public, do not know about.

The bill will help increase the public's faith in the integrity of government, enable the public to better understand the decisions reached by the Government, and better acquaint the public with the process by which agency decisions are reached.

S. 5 in no way changes the substantive laws governing Congress or any agency. It in no way increases the right of the public to actively

participate in any meeting. What it does do is end the secrecy in which many Government decisions are now made.

OPEN CONGRESSIONAL MEETINGS

Title I amends the rules of the House and Senate governing committee meetings, except hearings, by requiring such meetings to be open except in certain specified circumstances.

Sections 101 and 102 require the Senate and the House to hold mark-ups and other committee meetings, other than hearings, in public unless the committee or subcommittee votes to close the meeting on one of five specific grounds. These exceptions cover such matters as national defense and foreign policy, personnel matters, criminal or civil investigations, personal privacy, and trade secrets. The meeting may be closed only if a quorum of the committee votes to close the meeting. Section 104 imposes the same requirements on the meetings of joint committees. Presently, the Senate rules provide that mark-ups and other voting sessions of most committees are closed, unless the committee votes to open them in specific instances, or unless the committee votes to adopt on its own a general, open meeting rule. In the House, such meetings are open unless the committee votes to close them, but the applicable rule does not limit the reasons which a committee may invoke to close the meeting.

Title I does not affect the rules now governing committee hearings because the law already requires them to be open unless committees close them on one or more specified grounds.

Section 103 requires that all meetings of conference committees be open unless either the House or Senate managers determine by a majority vote that the meeting should be closed. The bill does not specify the grounds that may justify closing the meeting of a conference committee. Presently there are no rules governing open conference committees. The House has already passed a rule identical to section 103, but its implementation is contingent upon the Senate passing the same rule.

Section 105 explicitly states that title I is enacted pursuant to the rulemaking authority of both Houses. It recognizes the right of either House to alter the rules as they apply to such House, or to enact other rules.

OPEN AGENCY MEETINGS

Section 201 applies to the Federal Election Commission and the 46 other Federal agencies headed by two or more Commissioners or similar officers appointed by the President with the advice and consent of the Senate. The bill requires meetings between heads of such agencies to be open to the public. A list of the agencies covered by this section is included in the section-by-section analysis of subsection 201(a).

Section 201(a) establishes the basic principle that all meetings between the heads of these collegial agencies must be open to the public. The term "meeting" is defined to include agency deliberations where at least a quorum of the agency's members meet to conduct or dispose of official agency business. Chance encounters which do not involve substantive discussions, and social events at which business is not discussed, would not be covered by the section. Nor does the bill cover

discussions between less than a quorum of the Commission, or discussions between a Commissioner and any number of staff employees.

Subsection (b) provides that meetings can be closed by the agency only by a majority vote of all agency members. As in the case of committee meetings, the bill requires that a meeting may be closed only on one of ten specified grounds. These grounds are based in most respects on the exceptions contained in the Freedom of Information Act. At the same time, an agency may decide that it would, on balance, be in the public interest to conduct in the open even those meetings which fall under one of the exceptions. Closed meetings are never mandated.

To insure that the public knows about agency meetings, and has a chance to attend, the bill requires advance notice of each meeting and its subject matter. If any agency closes any meeting it must announce its decision ahead of time, along with an explanation of its action, and make a verbatim record of the meeting. After the meeting, it must release to the public every major portion of the meeting that did not in fact involve sensitive matters. The bill also provides that if an agency must close a majority of its meetings because its discussions involve certain specified types of sensitive information, the agency may follow expedited procedures when announcing the meeting, or deciding to close it to the public.

The remaining provisions in section 201 establish procedures for enforcing the section's open meeting provisions in court.

EX PARTE CONTACTS

Section 202 establishes an across-the-board statutory prohibition of ex parte contacts between agency decisionmakers and all persons outside the agency where the purpose of the contact is to discuss the merits of any matter being formally adjudicated by the agency. The new rule will prevent secret communications between the agency and an outside person interested in the outcome of a proceeding. The section, applicable to all agencies in the executive branch, whether or not they are multiheaded, replaces the very limited provisions in the Administrative Procedure Act now governing ex parte communications.

Section 202 applies to formal agency adjudications and rulemaking proceedings which are adjudicative in nature (so-called formal "on-the-record" rulemaking). In such cases all communications between agency officials and any outside person must either be on the public record, or have been preceded by reasonable notice to all parties. Whenever any communication occurs in violation of this section, the material submitted, or a record of the oral conversation held, must be placed in the public record of the proceeding. Whenever any person knowingly engages in such illegal communications with agency officials about a pending case, the agency may, in its discretion, take action on the merits against such party. This last provision reflects case law approving similar remedial action which agencies have taken on their own. See, e.g., *Jacksonville Broadcasting Corporation* v. *FCC*, 348 F. 2d 75 (1965).

Section 202 strengthens ex parte provisions now in the Administrative Procedure Act in a number of ways. It extends the persons governed by it to include all those agency employees involved in the de-

cisionmaking process, including commissioners. Currently only hearings examiners are covered. It broadens the type of agency proceedings covered so as to include not only formal adjudications, but also formal rulemaking proceedings governed by the same rules as formal adjudications. It specifies that the prohibition against ex parte communications shall start at an early point in the proceedings. It applies to all communications "relevant to the merits of the proceedings." It precisely spells out for the first time the corrective steps that an agency official must take if an ex parte communication does take place. And it specifically provides for sanctions that an agency may impose against any person violating the rules on ex parte communications.

Background and Purpose of the Legislation

This bill represents the logical extension of legislation passed by Congress over the last decade designed to open the government's decisionmaking process to the public.

In 1955 the House of Representatives created a Special Subcommittee on Government Information chaired by Rep. John E. Moss (D.-Calif.). The investigative and legislative hearings held by that panel contributed significantly to the creation and enactment in 1966 of the Freedom of Information Act, 5 U.S.C. 552. In 1972, while major oversight hearings were underway regarding the administration and operation of the Freedom of Information Act, in particular, and government information policy in general, another attempt to open the people's business to public view culminated in the enactment of the Federal Advisory Committee Act, 5 U.S.C. App. I. In addition to its other provisions, this statute establishes the presumption that the meetings of advisory committees and study panels should be open to the public.

In 1974 the Congress enacted new legislation amending and strengthening the public's right to gain access under the Freedom of Information Act to information in the government's possession.

This bill is fully in accord with the principles and aims of the previous legislation.

One important effect of the bill will be to increase the public's confidence in government. Mr. Lou Harris, a leading pollster, summed up the current public mood during committee hearings on the Government in the Sunshine legislation as follows:

> At this point in our history, the people are roundly fed up with what they feel is incompetence, inefficiency, corruption, lack of real public interest, and just plain lack of decency in the governing circle of this country. I do not say that idly, Mr. Chairman. Most of all, people are firmly wedded to the notion that if the Federal Government were opened up, rather than gross inefficiencies and lack of candor resulting, to the contrary, an opening of the Federal decisionmaking process would indeed lead to wiser, sounder, more creative and better decisions. (Hearings on S. 260, 1974, p. 163.)

The committee is confident that the public will be favorably impressed by the integrity, competence, and dedication of the great majority of agency heads. Open meetings will thus help increase the

public's confidence in government by permitting the public to observe firsthand the responsible way agency heads carry out their duties.

On the other hand, where the government is not functioning as well as it could public exposure should help insure that the quality of work remains at the highest possible level. The committee believes that it would be far less damaging to government if the facts, regardless of their nature, were disclosed openly to the public and the press, rather than emerging only indirectly through speculation or scandal.

Press speculation or partial leaks of information are often more damaging than the actual facts. (See, e.g., Hearings on S. 260, 1974, pp. 16, 217, 295.) Where the press must rely on leaks for its information there will inevitably be inaccuracies as well as partisan or self-serving statements.

As John Gardner, Chairman of Common Cause, said when testifying in strong support of S. 5:

> Secrecy is fatal to accountability. Citizens cannot hold government officials accountable—if they do not know what government officials are doing. All of the great instruments of accountability that the citizen must depend on—Congress, the courts, the electoral process, the press—may be rendered impotent if the information crucial to their functions is withheld. (Hearings on S. 260, 1974, p. 51.)

The public is naturally more distrustful of government conducted in secret. This suspicion arises in large part from the fact that meetings are closed, not from any specific evidence that improper or illegal activities are taking place behind closed doors. Regardless of what the public actually learns about the government, the fact that this bill opens meetings formerly closed should in itself remove an important source of any distrust the public may have of government.

In addition, this bill should enhance greatly the public's understanding of the decisions reached by the government. The Freedom of Information Act enables the public to review many of the domuments on which government decisions are based. These represent a record of what has already transpired. Yet up to now the public has not had a full opportunity to learn how or why government official make the important policy decisions which they do. All too often the meetings at which such decisions are made are closed to the public. Interested persons must content themselves with elementary minutes, or background papers tangentially related to the official agenda. Formal statements in support of agency actions are frequently too brief, or too general, to fully explain the Commission's reasoning, or the compromises that were made. As a result, the public may not understand the reasons an agency has acted in a certain way, or even what exactly it has decided to do. By requiring important decisions to be made openly, this bill will create better public understanding of agency decisions.

The committee believes that this openness will significantly increase cooperation between the public and government agencies. It will enhance the public's comprehension of the difficult choices agencies must often make, and provide a greater appreciation of the problems they face. Moreover, openness will better demonstrate what facts and policy considerations the agency found important in reaching its decision, and what alternatives it considered and rejected. As citizens listen to debate

between the heads of an agency, they will be able to identify precisely the issues that are of most concern to the agency.

Greater public understanding of the exact nature and reason for agency decisions should also promote greater compliance. Members of the public directly affected by an agency's action will no longer have to guess what exactly is expected of them as a result of a particular decision. They will know not only what the agency decided, but the purpose and intent of the agency's actions.

Finally, as all elements of the public gain an equal opportunity to learn about the issues and problems confronting agencies, wider and more informed public debate of the agency's policies becomes possible. Increased public interest and discussion cannot help but contribute to improve decisionmaking process.

One of the leading scholars on administrative law, Professor Kenneth Culp Davis of the University of Chicago Law School, summarized his strong support of the Government in the Sunshine legislation as follows:

> Open meetings would at first cause consternation and opposition. But gradually open meetings would be accepted. Making more of the realities known to the public would facilitate criticism, and the principal result would be to improve the quality of what is done. Furthermore, the democratic influence would be stronger. The relation between agencies on one side and media and pressure groups of the other side would be improved, because misunderstanding resulting from partial information, as distinguished from full information, would be reduced. (See *Government in the Sunshine: Responses to Subcommittee Questionnaire*, Government Operations Committee Print, 1973, p. 67.)

The success Congress and the committee have recently had in opening its activities to the public confirms the effectiveness and practicality of S. 5.

In the first year after the House in 1973 adopted a rule requiring committees to hold their bill-drafting meetings in public, unless the committee voted to close the meeting, 80 percent of all mark-ups were open to the public. Previously, every committee but one conducted its mark-ups in private (Hearings on S. 260, 1974, p. 47). In 1974, the number of open committee mark-ups in the House increased to 88 percent. In 1975 the House confirmed the success of such open government legislation by re-enacting its rule on open committee meetings. At the same time it strengthened one of its provisions.

This committee believes that its own experience with open mark-ups has clearly been a success. Since the committee adopted a rule requiring open mark-ups, it has not voted to close a single one. Conducting mark-ups in public has not interfered with the orderly and efficient conduct of business.

The Senate Committee on Banking, Housing and Urban Affairs, and the Committee on Interior and Insular Affairs have had similar rules since 1973. These committees also conclude without hesitation that the open-meeting rule has neither interfered with their work, nor inhibited free and open discussions. (Hearings, pp. 92–94, p. 104.)

80-459 O - 77 - 14

Over the last 2 years the Government Operations Committee, the Banking, Housing, and Urban Affairs Committee, and the Interior Committee have dealt effectively in open sessions with such important and often controversial legislation as the Congressional Budget and Impoundment Control Act of 1973, the Energy Reorganization Act of 1973, the Housing and Community Development Act of 1974, the Export-Import Bank, and legislation concerning energy allocation, land use policy, consumer protection, and surface mining and mineral leasing.

Open meeting laws are also a widely accepted and successful part of State law. Forty-nine States now have open meetings laws, and thirty-five States have constitutional provisions relating to open government.

State laws on open government have developed largely since 1950, when only one law was in effect. In the last few years especially, such legislation has gained wide acceptance at the State level. Nine new laws were passed during 1972–73. In 1974, ten States strengthened existing legislation. Moreover, no open meeting law has been repealed except to be strengthened. Several States have also recently amended their constitutions to add more comprehensive provisions on open government.

Forty-nine States open state-level agencies. Forty-four States provide for open meetings of county and city level nonlegislative agencies, as well as city councils and county boards. Currently, State legislatures in 35 States open committee deliberations to the public. In contrast, only 17 States opened committee meetings to the public as a matter of course in 1972. The appendix to this report contains a summary of the open meeting laws in all 50 States.

The State of Florida has the most comprehensive open meetings law in the country. The Florida law opens to the public all discussions and deliberations of government where "official acts are to be taken." Since its passage in 1967, Florida's "Sunshine Law" has been well received by the judiciary. The courts have neither significantly limited the broad scope of the law, nor riddled it with exceptions. Indeed, the judicial acceptance of this strong open government law has fostered the development of similar laws in other States.

Governor Reubin Askew of Florida, testifying on the Florida law before the committee, stated that ". . . Predictions that too much sunshine would lead to unnecessary embarrassment of public employees, costlier land acquisitions, and other problems have not been borne out by the Florida experience." A major study of the Florida law by the Center for Governmental Responsibility polled city councilmen across the State and found that 77 percent favored the law, though several exemptions, similar to those in S. 5, were proposed.

The committee received views in support of open meeting laws from the Attorney General's Office in a number of other States as well. The Attorney General of California told the committee that open meeting requirements have generally had a "salubrious effect" in that State. The Attorney General of Washington believes the law in that State "has been beneficial to the citizens" of the State and "has led to increasing awareness by those deliberative bodies affected by it for the need to adequately prepare themselves for meetings." The Attorney General

of North Carolina concludes that the State's open meetings bill "has substantially improved the governmental process," and that it has "helped increase public confidence in government."

The all but universal trend at the State level in favor of Government in the Sunshine legislation is clear evidence that such legislation is both practical and beneficial. Such widespread adoption of the legislation would not have occurred had the States found them unsuccessful or unworkable. One recent commentary on such State laws in fact concluded that "contemporary arguments by commentators in opposition to such laws are virtually nonexistent." (45 Mississippi Law Journal 1151, 1162.)

In short, this committee is convinced that past experience with open meeting legislation constitutes strong grounds for believing that the Federal Government will benefit significantly from general legislation requiring meetings in both the executive and legislative branches to be open.

Section 202, prohibiting ex parte contacts, answers a similar need to insure openness in the way the Government decides formal adjudication and rulemaking proceedings.

Ex parte contacts made secretly between one party to the proceeding and an agency official prevent other interested parties from countering the arguments presented. It may also make it impossible for the public to understand why an agency decided the case as it did. Such contacts make it difficult for Congress to exercise effective oversight of the practices and policies of regulatory agencies. In short, ex parte contacts are totally inconsistent with the principle of open government.

Although the undesirability of ex parte contacts has long been recognized, the Administrative Procedure Act contains no general provision specifically prohibiting them. Section 202 amends the Administrative Procedure Act to clarify and reemphasive the extreme seriousness with which ex parte contacts should be viewed. It provides clear notice to all concerned that ex parte contacts are not only illegal, but may actually result in the agency finding on the merits against a party who knowingly violates the provision.

The need for regulation of ex parte contacts in adjudicative proceedings was first dramatized by the exposure of improper influence in the granting of broadcast licenses by Federal agencies in the 1950's. The 1961–62 Administrative Conference attempted to deal with the problem by recommending that each agency promulgate a code of behavior governing ex parte contacts. While a number of the agencies did formulate such rules, they vary greatly in the types of contacts covered. Furthermore, rules adopted by an agency may be modified or repealed by the same agency at any time. Such rules lack the authority and permanence of a general statutory prohibition of ex parte contacts.

In 1963 Administrative Law Section of the American Bar Association undertook a study of the Administrative Procedure Act, including a review of its ex parte provisions. In 1970 the House of Delegates of the American Bar Association endorsed enactment of a broad rule prohibiting ex parte contacts. Between 1970 and 1974 an Association committee drafted language implementing this resolution. Section

202 of the bill follows closely the wording developed by the American Bar Association.

In 1884 Woodrow Wilson stated:

> Light is the only thing that can sweeten our political atmosphere—light thrown upon every detail of administration in the departments—light blazed full upon every feature of legislation—light that can penetrate every recess or corner in which any intrigue might hide; light that will open to view the innermost chambers of Government.

The committee fully agrees.

History of Legislation

The legislation was initially introduced as S. 3881 on August 9, 1972, by Senator Lawton Chiles.

While there was informal consideration of the bill during the 92d Congress, no legislative action was taken. As a consequence of these discussions, a more developed and comprehensive proposal was drafted and offered by Senator Chiles in the 93d Congress. Introduced on January 9, 1973, with several cosponsors, the measure (S. 260) contained two titles, one pertaining to congressional committee proceedings and one governing executive branch agency meetings. A new section regarding ex parte communications was added to the latter title.

In the summer of 1973, the Subcommittee on Reorganization, Research, and International Organizations, chaired by Senator Ribicoff, solicited the views of public administration experts, legal scholars, representatives of the media, and professional organizations. (See *Government in the Sunshine: Responses to Subcommittee Questionnaire*, Senate Government Operations Committee Print 1973). An overwhelming majority of the responses to the questionnaire strongly supported Government in the Sunshine legislation.

Two days of hearings on S. 260 were held by the subcommittee on May 21 and 22, 1974, under the direction of Senator Chiles. An additional day of hearings was held on October 15.

The bill was reintroduced by Senator Chiles as S. 5 on January 15, 1975.

On May 12, the Subcommittee on Federal Spending Practices, Efficiency, and Open Government, meeting in open session, unanimously adopted an amended version of S. 5. The full committee met in open session on June 18 and July 9, and the bill, as further amended, was ordered reported by the full committee on July 9th by a unanimous vote.

In preparing this legislation the committee has consulted with a large number of legal experts both within the government and the private sector. It received comments on the legislation from 43 agencies of the government.

During its consideration of S. 5 the committee made a large number of amendments to the bill in response to suggestions by members of Federal agencies, Congress and the public. These amendments further insure that the Government will be able to open their activities to the

public without imposing unnecessary procedural burdens on the Government, or interfering with the Government's effectiveness. The following is a summary of some of the more important amendments adopted by the committee.

Sections 101 through 103 have been revised to conform in most respects to S. Res. 9 and S. Res. 12 and the provision in the Congressional Budget Act of 1974, Public Law 93–344, enacted by Congress in 1974. A number of the procedural requirements contained in the original bill were eliminated.

Section 201 was amended in a number of ways. The scope of section 201(a) was limited so that is applies only to those multiheaded agencies headed by Officials appointed by the President with the advice and consent of the Senate. The definition of "meeting" was redrafted to exclude many discussions which are informal in nature. Subsection (b) was amended to provide agencies with additional flexibility to close meetings where necessary. A number of paragraphs were added specifying additional grounds justifying a closed meeting, and the scope of other paragraphs, such as the one governing adjudication, was broadened. Another amendment provides that an agency may withhold information about a meeting for the same reasons that may require the agency to close the meeting in the first place. Other wording added to subsection (b) clarifies the right of an agency to close a meeting where it determines that the meeting can be reasonably expected to involve sensitive matters. Absolute certainty is not required on the part of the agency. The section is not intended to require such a showing of certainty in any judicial proceeding invoking this section.

Amendments to subsection (c), (d) and (e) relieve agencies of a number of the procedural requirements contained in the original bill. One amendment to subsection (c) authorizes agencies in certain cases to issue general regulations specifying in advance the meetings that must be closed. Another amendment gives agencies the right to change on short notice the agenda of their meetings, or to revise their prior decisions to open or close meetings. The public announcement an agency must make of its meetings was expanded to include notice in the Federal Register either before or after the meetings is held.

Instead of requiring an agency to maintain a transcript or electronic recording of all its meetings, subsection (e) was amended to require a verbatim record of only those meetings closed to the public. Meetings discussing cases in adjudication were exempted from the requirement of a verbatim record in all cases. Other changes provide that agencies will not have to edit the transcripts in great detail, nor provide written explanations of any deletions it makes in the transcripts released to the public.

Other amendments to section 201 prevent district courts from overturning agency action taken at a meeting improperly closed to the public, and strictly limit the ability of a court to assess the costs of litigation against an individual agency member.

The wording in section 202 governing ex parte contacts was changed in several ways. One amendment limits the authority of an agency to rule on the merits against a party committing an ex parte violation. As now worded, an agency may rule against such a party only where the violation was knowing. Similarly, wording was added making a

communication by one person, on behalf of another, ex parte only where it was done with the knowledge of the other person. Another amendment deletes a provision in the original bill that exempted ex parte communications from certain types of persons who were neither parties, intervenors, nor Government officials. The provision granting the district court jurisdiction to enforce the requirements of the section was deleted.

Finally, provisions were added to section 203 clarifying the relationship between this bill and the Freedom of Information Act and the Privacy Act.

Section-by-Section Analysis

INTRODUCTORY SECTIONS

Section 1. This section states that the bill may be cited as the "Government in the Sunshine Act."

Section 2. This section establishes as the policy of the United States the principle that the public should have the fullest practicable knowledge about the decisionmaking process of the Government. It is the purpose of the bill to implement this policy without infringing upon the rights of individual citizens and the ability of the Government to carry out its responsibilities. The provision thus reaffirms the principle that openness is desirable in a democratic Government. It is the intent of this bill that governmental bodies conduct their deliberations in public to the greatest extent possible. At the same time, the section explicitly recognizes that the bill must also protect the ability of the Government to carry out its responsibilities, and protect the rights of individuals, such as the right of privacy, or the right to a fair and impartial trial. The bill's provisions have been drafted in full recognition of the fact that Government, if it is truly to serve the public, must not only be open, but also effective and fair.

Section 3. This section defines "person" in the same way as the Administrative Procedure Act, and should be interpreted in the same way as that act. The definition includes an individual, but excludes an agency.

Title I—Congressional Procedures

SECTION 101—SENATE COMMITTEES

Section 101(a). Paragraph (1) strikes the portion of section 133(b) of the Legislative Reorganization Act now governing executive sessions of Senate committees. The present rule provides that markups and other voting sessions of the committee will be closed unless the committee votes to open them in specific instances, or unless the committee votes to adopt on its own a general open meeting rule.

Paragraph (2) amends the Legislative Reorganization Act to provide new rules governing all meetings of a Senate committee or subcommittee discussing committee business, with the exception of hearings. The section establishes a presumption in favor of openness of all Senate committee meetings in accordance with the general policy of the bill. Openness should be the rule and secrecy the exception. The new rule requires that all committee meetings, other than hearings, shall be open unless a majority of the members of the committee or

subcommittee present decide by record vote to close the meeting, or a portion of the meeting, on one of five specified grounds.

These five grounds are designed to cover those instances when it may be necessary for a committee to meet in closed session. Even if a matter does come within one of these five provisions, the committee must decide in each particular case whether the need for secrecy outweighs the general need for openness in Government. Since this judgment must be made in each case, with full recognition of all the facts, the rule requires the committee to vote on each meeting separately. The committee may not adopt general rules closing certain types of meetings. If a committee discussion of a particular matter is extended over several days, the committee should vote at the beginning of each day's meeting whether to close the meeting. Where only a portion of a committee meeting needs to be closed to the public, the committee should arrange for the remainder to be open.

The five grounds which a committee may invoke to close a meeting are listed in clauses (1) through (5) of the new rule.

Section 101(a)(1) exempts matters necessary to be kept secret in the interests of national defense or the foreign policy of the United States.

This exemption is similar to that in the Freedom of Information Act, as amended (5 U.S.C. 552(b)(1)). The meaning that the terms "national defense" and "foreign policy" have under that act should provide guidance to Congress in implementing this provision. However, since the section applies to the Congress, not the executive branch, the exemption does not expressly rely on the status any material may have under executive branch rules of classification.

Section 101(a)(2) exempts matters relating solely to committee staff personnel or internal staff management or procedure. The provision recognizes that discussions involving such matters as the hiring of a particular individual to serve on the staff of the committee should be be closed so as to enable a candid discussion of the individual's qualifications.

Section 101(a)(3) exempts matters which will tend to charge an individual with crime or misconduct; injure the professional reputation of any individual, or expose any individual to public contempt or obloquy; or represent a clearly unwarranted invasion of an individual's privacy.

Any committee must be aware of the effect publicity arising from one of its meetings may have on an individual's reputation. Special care must be taken not to unfairly injure an individual's reputation by unconfirmed or misleading statements. However, the language of the exemption should not be read as justifying the closing of every committee meeting that may in some way affect an individual's reputation. Such restrictiveness would not be in accord with the intent of either the bill or this clause. In each case, the committee will have to balance the possible harm to the individual against the need for openness in Government. The possibility that one member of the committee might make a casual remark concerning some individual might not constitute grounds for closing a meeting, whereas formal consideration of committee action in some way censuring an individual might justify closing the meeting.

In deciding whether to close a particular meeting, different standards should apply to private individuals and public officials. The public has a right to know fully about the actions of Government officials

in their public capacity. What is considered an invasion of privacy of a private citizen may be justified when the official conduct of a public employee is involved.

Section 101 (a)(4) exempts discussions that would disclose the identity of an informer or law enforcement agent, or that would disclose information relating to the investigation or prosecution of any civil or criminal violation of law that must be kept confidential in the interests of effective law enforcement.

It is expected that this provision will be applicable primarily to meetings concerning such aspects of a committee investigation as the issuance of a subpena. Premature disclosure of the committee's decision to issue the subpena could destroy its effectiveness.

Section 101 (a)(5) exempts matters disclosing trade secrets or commercial or financial information where such matter is required to be kept secret by a statute, or where the information was obtained on a confidential basis and disclosure would cause undue injury to a person's competitive position.

Trade secrets and commercial or financial information must meet the same tests under this exemption. The information can not be generally applicable to an industry, but must "pertain specifically to a given person." The information discussed at the meeting must directly involve such sensitive matters, not merely be peripherally related to them.

The criteria established in clause 5(A) is applicable only to statutes which specifically requiring trade secrets or commercial or financial information to be kept confidential. General statutes which permit government officials to withhold information in the public interest do not meet this test. For example, it does not include the general type of statute involved in *Administrator, FAA* v. *Robertson*, 95 S. Ct. 2140 (1975).

Clause 5(B) establishes an alternative basis for closing meetings under this provision. Two criteria must be met. First, the government must have obtained the information under a pledge of confidentiality. Secondly, the information must be kept confidential in order to prevent undue injury to the competitive position of the person to whom the information specifically relates. In deciding whether the competitive injury would be "undue," the committee will have to balance the legitimate public interest in attending the meeting against the degree to which disclosure would substantially and unfairly injure a person's business interests.

Section 101(b). This subsection is a conforming amendment repealing the present provision in the Standing Rules of the Senate governing the meetings, other than hearings, of all standing committees.

Section 101(c). This subsection amends the table of contents of the Legislative Reorganization Act of 1946 to include a reference to the new provision governing Senate committees enacted by section 101(a) of the bill.

SECTION 102—HOUSE COMMITTEES

This section amends the rules of the House of Representatives now governing all meetings, other than hearings, by adopting exactly the same rules as section 101(a) adopts for the Senate. The present rules of the House provide that all such meetings, except those involving internal committee budgets or personnel matters, will be open unless

the committee votes to close them. Since the rules do not specify the grounds that justify closing a meeting, a committee may close a meeting for any reason.

Section 102 would require House committees to close their meetings only under the same specified circumstances as permit a Senate committee to close its meetings under section 101(a). Public understanding of the rules governing open meetings in the Congress will be enhanced if the same open-meeting rules govern committee meetings in both Houses. However, this provision is included with full recognition of the right of the House of Representatives to establish its own rules governing committee meetings. Section 105 of the bill specifically reserves the right of the House of Representatives to adopt different rules should it wish to do so.

SECTION 103—CONFERENCE COMMITTEES

Section 103(a). This subsection adds a new provision to the Legislative Reorganization Act to govern conference committees. The rule provides that conferences between the Senate and the House will be open to the public unless the managers of either the Senate or House in open session decide to close the meeting on that particular day by a rollcall vote of the majority of such managers present.

The provision is identical to a resolution the House has already approved this year, House Rule XXVIII, clause 6. The House action must await Senate action before it can become effective. While the provision establishes a presumption of openness, either House reserves the right to close a meeting of a conference committee should it so wish.

Section 103(b). This subsection amends the table of contents of the Legislative Reorganization Act of 1946 to include a reference to the new rule on House-Senate conferences.

SECTION 104—JOINT COMMITTEES

Section 104(a). This subsection amends the Legislative Reorganization Act by adopting rules governing joint committee meetings. The rules are identical to the rules section 101(a) establishes for the meetings of Senate committees and section 102(a) establishes for the meetings of House committees. They should be interpreted and administered in the same way.

Section 104(b). This subsection amends the table of contents of the Legislative Reorganization Act of 1946 to include a reference to the new rules governing the meetings of joint committees.

SECTION 105—EXERCISE OF RULEMAKING POWERS

This section specifies that the rule changes contained in title I are enacted pursuant to the rulemaking authority of the Senate and the House of Representatives.

It recognizes that under the Constitution either House retains the full right to subsequently change the rules established by title I insofar as they apply to such House, regardless of the actions of the other House. It is in no way the intent of the committee to interfere with the right of the House of Representatives to adopt other rules governing the opening of committee meetings should it so wish.

Title II—Agency Proceedings

SECTION 201—OPEN MEETINGS

Section 201(a). This subsection extends the principles of open government to Federal agencies by requiring meetings between the various heads of a multiheaded agency to be open to the public. The Declaration of Policy in section 2 applies with equal force to title I and title II. Subsection (a) also defines the specific agencies, and the specific types of meetings, subject to the open meeting requirement.

AGENCIES INCLUDED

Subsection 201(a) defines "agency" as in the Administrative Procedure Act. A governmental body may fall within the Administrative Procedure Act definition, and thus fall within section 201, assuming it qualifies under the other tests established by the subsection, even if that agency is not actually governed by the other provisions of the Administrative Procedure Act.

Section 201 does not apply, however, to all agencies. To be subject to the section's open meeting provisions, the collegial body comprising the agency must consist of two or more individual members, a majority of whom are appointed by the President with the advice and consent of the Senate. Because of the unique nominating and confirmation process governing appointments to the Federal Election Commission, this agency is included by specific reference. The term "collegial body comprising the agency" does not refer to a single individual who heads an agency with the assistance of staff, nor to the staff of an agency. The term is limited solely to the two or more individuals serving on the commission or board which heads the agency, though it does include meetings of such a body when agency staff or outside individuals are also present.

The subsection does not cover bodies typically known as advisory committees. However, it does include other bodies comprised of part-time Government employees which meet from time to time to review agency activities and give guidance to staff, approve staff actions, review and approve the agency's proposed budget, and so on. Such a board would constitute "the collegial body comprising the agency" even though day-to-day supervision is provided by a single Administrator.

Any body that is subject to this bill shall not at the same time be subject to the provisions of the Federal Advisory Committee Act. Similarly, any body that is now governed by the Federal Advisory Committee Act, or which is determined in the future to be governed by that act, is not governed by this bill. The committee will rely on the continuing oversight of the Subcommittee on Reports, Accounting, and Management to insure that any body that is properly subject to the Advisory Committee Act will continue to follow the provisions of that act.

The following is a list of agencies that in the committee's judgment are covered by this section. It is based on consultations with the Department of Justice. In the final analysis, however, the wording of section 551 of title 5 and this subsection, rather than this list, must govern:

Board for International Broadcasting;
Civil Aeronautics Board;

Commodity Credit Corporation (Board of Directors);
Commodity Futures Trading Commission;
Consumer Product Safety Commission;
Equal Employment Opportunity Commission;
Export-Import Bank of the United States (Board of Directors);
Federal Communications Commission;
Federal Election Commission;
Federal Deposit Insurance Corporation (Board of Directors);
Federal Farm Credit Board within the Farm Credit Administration;
Federal Home Loan Bank Board;
Federal Maritime Commission;
Federal Power Commission;
Federal Reserve Board;
Federal Trade Commission;
Harry S. Truman Scholarship Foundation (Board of Trustees);
Indian Claims Commission;
Inter-American Foundation (Board of Directors);
Interstate Commerce Commission;
Legal Services Corporation (Board of Directors);
Mississippi River Commission;
National Commission on Libraries and Information Science;
National Council on Educational Research;
National Council on Quality in Education;
National Credit Union Board;
National Homeownership Foundation (Board of Directors);
National Labor Relations Board;
National Library of Medicine (Board of Regents);
National Mediation Board;
National Science Board of the National Science Foundation;
National Transportation Safety Board;
Nuclear Regulatory Commission;
Occupational Safety and Health Review Commission;
Overseas Private Investment Corporation (Board of Directors);
Parole Board;
Railroad Retirement Board;
Renegotiation Board;
Securities and Exchange Commission;
Tennessee Valley Authority (Board of Directors);
Uniformed Services University of the Health Sciences (Board of Regents);
U.S. Civil Service Commission;
U.S. Commission on Civil Rights;
U.S. Foreign Claims Settlement Commission;
U.S. International Trade Commission;
U.S. Postal Service (Board of Governors); and
U.S. Railway Association;

S. 5 does not mandate open meetings in the case of single-headed agencies, such as the Departments of Defense, Commerce, or Treasury,

because of the different nature of such agencies. Multiheaded agencies operate on the principle of give-and-take discussion between agency heads. There is a tradition of public dissent; though the agency takes a final action, it does not necessarily speak with one voice. The agency heads are high public officials, having been selected and confirmed through a process very different from that used for staff members. Their deliberative process can be appropriately exposed to public scrutiny in order to give citizens an awareness of the process and rationale of decisionmaking.

The single-headed agency operates differently. Only the single head is ultimately responsible for agency actions, while the staff functions as extensions of the head. Opening staff meetings presents many complications, not the least of which is determining which of the innumerable staff meetings that occur every day should be open. While these difficulties may not be insurmountable, they require a different approach than used in section 201.

It is the committee's hope that each agency not covered by section 201 will closely examine its internal procedures and take on its own every step it can to open up its decisionmaking process, including meetings, to the public. This might include, for example, opening to the public meetings between agency officials and outside parties, and providing the public with more information about why an agency took a particular decision, and the alternatives it considered.

Section 201(a) covers all multiheaded agencies, because the principle of openness applies to all such agencies regardless of the particular nature of its responsibilities. While many of those covered are regulatory, others have more general policymaking roles. The decisions of one may involve no less important policy questions than the decisions of the other. Opening one type of meeting to the public is as important as opening another type. The notion of including some multiheaded agencies in section 201 and excluding others would do violence to the fundamental purpose of the legislation, which is to open Government to the people wherever and whenever possible.

Section 201(a) provides that all meetings of the individual Commissioners, board members, or the like, except those discussions exempted by subsection (b), must be open to the public. Included within this requirement are meetings of agency subdivisions authorized to take action on behalf of the agency. The open meeting requirement applies to panels of a Commission, or regional boards, consisting of two or more agency heads and authorized to take action on behalf of the agency. To be a subdivision of an agency covered by this subsection, the panel need not have authority to take agency action which is final in nature. Panels or boards composed of two or more agency members and authorized to submit recommendations, preliminary decisions, or the like to the full commission, or to conduct hearings on behalf of the agency, are required by the subsection to open their meetings to the public.

Some agencies do not vest all power in the multiheaded body, but reserve certain functions for the chairman alone. In such cases, meetings of the chairman with staff members, or even with other individual agency heads, acting solely as informal advisers, would not have to be open.

Interagency meetings between members of one agency and officials from other agencies would not come within the provisions of this section unless a majority of the members of one or more of the agencies attended the meeting. Similarly, interagency committees are excluded from this section.

DEFINITION OF MEETING

The definition in subsection (a) of the meetings required to be open to the public is a critical part of the section. A meeting means the deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations concern the joint conduct or disposition of official agency business. In addition to business meetings of the agency, it includes hearings and meetings with the public.

To be a meeting the discussion must be of some substance. Brief references to agency business where the commission members do not give serious attention to the matter do not constitute a meeting. A chance encounter where passing reference is made to agency business, such as setting a time or place for the agency heads to meet, would not be a meeting. A luncheon attended by a majority of the Commissioners would not be a meeting subject to the bill simply because one Commissioner made a brief, casual remark about an agency matter which did not elicit substantial further comment. The words "deliberation" and "conduct" were carefully chosen to indicate that some degree of formality is required before a gathering is considered a meeting for purposes of this section.

The definition of meetings includes the conduct, as well as the disposition, of official agency matters. It is not sufficient for the purposes of open government to merely have the public witness final agency votes. The meetings opened by section 201(a) are not intended to be merely reruns staged for the public after agency members have discussed the issue in private and predetermined their views. The whole decisionmaking process, not merely its results, must be exposed to public scrutiny.

To constitute a meeting for purposes of this section the requisite number of agency heads must at least be potentially involved in the discussion. The use of the word "joint" is intended to exclude instances where one or more agency member gives a formal speech concerning agency business, and other members of the commission are in the audience. The word also excludes instances where a single agency head, authorized to conduct a meeting on behalf of the agency, or to take action on behalf of the agency, meets with members of the public, or staff. In all cases, the meeting must involve at least two agency members for the deliberations to be joint.

The deliberations must also involve "official agency business." Discussions among all the agency heads about a purely social gathering do not concern official business of the agency, and would not come within the terms of the subsection. On the other hand, the mere setting of the gathering is not determinative whether a gathering is a meeting for purposes of this subsection. Discussions held in the board room or the Chairman's office are not the only gatherings covered. Conference telephone calls and meetings outside the agency are equally subject to the bill if they discuss agency business and otherwise meet the require-

ments of this subsection. The test is what the discussion involves, not where or how it is conducted.

The reference to the number of individual agency members required to take action means a quorum. In some cases this may mean a simple majority. In other cases, such as a hearing or a meeting conducted by agency members on behalf of the agency, it may be less than a majority of the agency, and as few as two agency members. In three-member agencies, two members will constitute a quorum. This situation will require special sensitivity and judgment. It is not the intent of the bill to prevent any two agency members, regardles of agency size, from engaging in informal background discussions which clarify issues and expose varying views. When two members are less than a quorum, such discussions would not in any event come under the section's open meeting requirements. When two members constitute a quorum, however, the agency must be careful not to cross over the line and engage in discussions which effectively predetermine official actions. Members of such agencies must use their judgment in these situations, again with the awareness that this bill carries a presumption of openness. Their discussions should remain informal and preliminary to avoid the open meeting requirement.

EFFECT OF SUBSECTION 201(a)

Any meeting falling outside the definition in subsection (a) is not subject to any of the other provisions of the bill. If a meeting does come within the terms of section 201(a), it must be open to the public unless it involves matters described in subsection (b). Except as otherwise provided in the bill, the agency must provide the public with certain information about the meeting, whether or not it is open to the public, and keep a verbatim record of meetings closed to the public unless they involve cases of adjudication. These requirements are described elsewhere in the section.

When a meeting must be open, the agency should make arrangements for a room large enough to accommodate a reasonable number of persons interested in attending. Holding a meeting in a small room, thereby denying access to most of the public, would violate this section and be contrary to its clear intent.

Nothing in subsection (a) requires an agency to permit the public to actively participate in the meeting. Other statutes and agency regulations and policies continue to govern such participation. Section 201(a) only gives the public the right to attend meetings, to listen and to observe.

Section 201(b). The requirements of section 201(a) establish a presumption in favor of open meetings. Subsection (b) allows an agency to close a meeting under certain circumstances, but these are exceptions to the underlying rule of openness. Agencies wishing to close a particular meeting will have the burden of justifying their actions. This approach reflects the philosophy of the bill that most government business can and should be conducted in the public eye. Workable limitations on openness are provided, but this section assures that openness is no longer to be conceived as an exception to the rule of secrecy.

Subsection (b) establishes 10 grounds on which an agency may vote to close meetings or portions of meetings to the public despite the rule of openness established by subsection (a). These exemptions apply equally to agency subdivisions authorized to take agency action. Closing a meeting on these grounds is permissive, not mandatory. The agency should not automatically close a meeting because it falls within an exception. The phrase "Except where the agency finds that the public interest requires otherwise," emphasizes that an agency may still decide that the public good achieved by opening the meeting outweighs the advantages to be gained by closing it.

In addition to closing a meeting, an agency may, on the same 10 grounds, withhold information about the meeting otherwise required by subsections (c) and (d) to be disclosed. For example, an agency need not disclose the subject matter of a closed meeting, or supply a list of those persons attending the meeting, and their affiliation, if that would disclose the very information that the meeting itself was closed to protect.

As with sections 101, 102, and 104, this section provides specific exemptions rather than grants of broad, discretionary authority to agencies to close their meetings. This is in accordance with the bill's policy that most meetings should be open, and closed meetings an exception. These exemptions should not be used to circumvent the spirit of openness which underlies this legislation.

The 10 exemptions apply when the agency "properly" determines that a closed meeting is appropriate. Improper determinations are subject to enforcement proceedings detailed in subsections (g) and (h). In making its determination, the agency's must fairly conclude that the meeting "can reasonably be expected" to fall within one of the 10 exemptions. Thus an agency wishing to close a meeting need not meet the test of absolute certainty, for it might not be possible to know exactly what information the meeting will disclose. Rather, there must only be a reasonable likelihood, based on the nature of the issue, past experience with the similar discussions, and the expressed intent of agency members to raise a sensitive matter. Where the possibility that a meeting will involve exempt matters is fairly remote, the meeting should begin as an open one. If the discussion does become sensitive, the agency may always vote to close the session.

The 10 grounds provided in the act for closing a meeting are as follows:

Section 201(b)(1). This paragraph covers meetings which disclose information specifically required to be kept secret by an Executive order in the interests of national defense or foreign policy, and which is properly classified pursuant to such Executive order.

The wording exactly follows the 1974 amendment to the Freedom of Information Act, 5 U.S.C. section 552(b)(1). The phrases "national defense" and "foreign policy" should be given the same meaning as in the Freedom of Information Act.

Subsection (e) requires an agency to keep a transcript or electronic recording of a meeting closed to the public, and subsection (g) allows a court to examine the record or other information before ordering its release or opening a meeting. A court should therefore be able to determine whether an agency is acting properly if it relies on this pro-

vision to close a meeting to the public. A holding analogous to that in *E.P.A.* v. *Mink, et al.*, 410 U.S. 73 (1973), in which the court declined to permit in camera inspection of classified documents, would be contrary to the intent of this exemption. It is expected that courts will at their discretion examine documents in camera to determine the propriety of the agency's action. Such examination need not be automatic, but in many situations will definitely be necessary. Before ordering in camera inspection, the court may at its discretion allow the Government the opportunity to establish by means of testimony or detailed affidavits submitted by a head of the agency that the meeting, or information related to it, is clearly exempt from disclosure under this section.

Once an agency properly classifies information relating to national defense or foreign policy pursuant to an Executive order, another agency cannot legally declassify it. If an agency subject to this section receives information properly classified by another agency, and public disclosure of the information is prohibited, the meeting must be closed. The agency would have no discretion, for the law provides that in such a case the agency must accept on its face the classification placed on the material by the originating agency. At the same time, the agency may request the classifying agency to review the classification and remove the restrictions prior to the meeting.

Section 201(b)(2). This paragraph exempts meetings which concern solely the agency's own internal personnel rules and practices. The purposes of this clause are to protect the privacy of staff members and to facilitate the agency's internal administration. It is not intended to cover an agency's discussion of personnel matters relating to any other agency, or to individuals working for private employers. This wording parallels the Freedom of Information Act, 5 U.S.C. 552(b)(2). This exemption does not include directions to agency personnel concerning their responsibility vis à vis the public, such as manuals explaining job functions. It includes only internal management matters.

In some cases it will be appropriate for an agency to open a meeting concerning matters of general public interest even though it involves internal personnel rules and practices. For example, an agency might open a discussion of the propriety of an employee's actions disclosing agency information to the public.

Section 201(b)(3). This paragraph applies to meetings which disclose information of a personal nature where disclosure would constitute a clearly unwarranted invasion of the personal privacy of an individual. This may include a discussion of an individual's drinking habits or health, or review of a grant application which requires assessing an individual's professional competence. Or it may include reviewing an individual's finances to determine his eligibility for financial aid.

It is not intended that agencies will close all meetings that involve personal information about individuals. Such restrictiveness is not in accord with the policy of either the bill or this exemption. Moreover, public officials and private individuals should be subject to different considerations. For instance, a meeting might be closed under this paragraph if it concerned the competence of the president of an entity regulated by the agency. Yet if the discussion centered on the alleged

incompetence with which a Government official has carried out his duties it might well be appropriate to keep the meeting open, since in that case the public has a special interest in knowing how well agency employees are carrying out their public responsibilities. This paragraph must not be used by an agency to shield itself from political controversy involving the agency and its employees about which the public should be informed.

The main purpose of this exemption is to protect an individual's privacy. It would clearly not be appropriate, therefore, to invoke this paragraph when the individual involved prefers the meeting to be open. The procedures an individual may follow if he wishes a meeting to be closed under this paragraph is detailed in subsection 201 (c) (1).

Section 201(b)(4). This paragraph covers meetings which accuse an individual or corporation of a crime, or formally censure such person. The term "formally censuring any person" includes formal reprimands. An agency may discuss a company's alleged crimes, such as the submission of fraudulent documents, and consider whether to refer the case to the Department of Justice for prosecution. An agency regulating financial or security matters may wish to censure a firm for failing to live up to its professional responsibilities, or an agency may consider whether to formally censure an attorney for his conduct in an agency proceeding. Opening to the public agency discussions of such matters could irreparably harm the person's reputation. If the agency decides not to accuse the person of a crime, or not to censure him, the harm done to the person's reputation by the open meeting could be very unfair.

This paragraph insures that where serious charges of this nature are formally discussed by the agency, the agency has the latitude to close the meeting, even if the discussion does not come within the precise terms of paragraph (5), governing investigatory files, or any other part of subsection (b). The provision should not be interpreted as grounds for closing every meeting placing a company in a bad light. To be applicable, the meeting must consider formal agency action accusing a person of a crime or formally censuring a person.

Section 201(b)(5). This paragraph applies to meetings which disclose information from investigatory records compiled for civil or criminal law enforcement purposes. A meeting could be closed, however, only to the extent that disclosure of records would interfere with enforcement proceedings; deprive a person of a right to a fair trial or an impartial adjudication; constitute an unwarranted invasion of personal privacy; disclose the identity of a confidential source; disclose confidential information furnished only by a confidential source in the course of a criminal or national security intelligence investigation; disclose investigative techniques and procedures; or endanger the life or physical safety of law enforcement personnel. This exemption is the same as the comparable provision in the Freedom of Information Act, as amended in 1974, 5 U.S.C. section 552(b)(7), and should be interpreted in a manner consistent with that act. It is included in recognition of the fact that premature public disclosure of certain matters concerning an investigation could jeopardize these investigations and hinder the ability of the agencies to fulfill their statutory duties.

80-459 O - 77 - 15

The investigatory records to be disclosed must have been "compiled for law enforcement purposes," involving specific persons. General records such as annual surveys are not included in this exemption. The provision would be applicable to certain discussions of the legal strategy and tactics to be used in a specific investigation, such as the issuance of a subpena where public knowledge of the discussion might lead to the destruction of documents. It would apply to a discussion identifying a particular individual as a confidential source who supplied specific information. It would not, however, apply to the information supplied by the confidential source in a civil law enforcement investigation which does not disclose the identity of the source. If agency consideration of the matter has advanced to the point where it specifically discusses the initiation, conduct, or disposition of a particular case of adjudication, paragraph (9), rather than this paragraph, will apply. As in the case of the rest of subsection (b), an agency may not be held to a showing of obsolute certainty before invoking this provision. The meeting may be closed if the agency properly determines, on the basis of its general experience and knowledge of the particular facts, that the meeting can reasonably be expected to fall within the terms of the paragraph.

Section 201(b)(6). This paragraph applies to meetings which disclose trade secrets or financial or commercial information obtained from any person where such trade secrets or other information could not be obtained by the agency without a pledge of confidentiality, or where such information must be withheld from the public in order to prevent substantial injury to the competitive position of the person to whom such information relates.

The trade secret exemption draws on current case law and commentary regarding exemptions for trade secrets and commercial or financial information found in other laws, especially the Freedom of Information Act, 5 U.S.C. section 552(b)(4). Rather than repeat the original wording contained in the Freedom of Information Act, paragraph (6) reflects as clearly as possible the present direction of the law.

Paragraph (b)(6) involves three tests. First, the information must be either (*a*) a trade secret, or (*b*) financial or commercial in nature. For example information relating to oil or gas reserves collected by an oil company, a technological invention of commercial value, and the level of a company's anticipated price rises, would all be covered by this paragraph.

Second, the information, whether a trade secret or financial or commercial information, must have been directly or indirectly obtained from a person as defined by section 3 of the bill. It includes information one agency has obtained from a person and in turn provided to another agency.

The third test is posed in the alternative. The first criteria is satisfied if there was no legal way for the agency to obtain the information, whether by voluntary or involuntary means without a pledge of confidentiality. This requirement is not satisfied if an agency could have subpenaed the information, or if a statute required the person to furnish it to the agency, whether or not the agency actually subpenaed the information. Pledges of confidentiality do not satisfy this clause

where the agency could have gone to court and obtained the information without giving such a pledge. The purpose of this test is to avoid impairing the Government's ability to obtain necessary information, where governmental access to information must depend on the voluntary cooperation of private individuals and businesses.

The third test may also be satisfied, and a meeting closed, if the information must be kept secret in order to prevent substantial injury to the competitive position of the person to whom the information relates. This may include information an agency can obtain involuntarily from a person. The "competitive position" affected by public disclosure must be that of the person "to whom such information relates." It does not apply to persons who can only make a general demonstration of commercial interest in the information to be disclosed. On the other hand, it does include a person possessing a trade secret which he has not yet used, but which he is likely to put to commercial use in the future.

Section 201(b)(7). This paragraph applies in certain specific instances where premature disclosure of information would destroy an agency's ability to perform its functions effectively. Subparagraph (A) applies to such agencies as the Federal Reserve Board, the Securities and Exchange Commission, the Federal Deposit Insurance Corporation, and similar agencies that regulate currencies, securities, commodities, or financial institions. The term "financial institutions" is intended to include banks, savings and loan associations, credit unions, brokers and dealers in securities or commodities, exchanges dealing in securities or commodities, such as the New York Stock Exchange, investment companies, investment advisers, self-regulatory organizations subject to 15 U.S.C. § 78s, and institutional managers as defined in 15 U.S.C. 78m(f). These agencies often discuss sensitive financial matters. When premature discussion of issues by these agencies would either (*i*) lead to serious financial speculation, or (*ii*) seriously endanger the stability of a financial institution, the meeting may be closed. A Federal Reserve Board discussion of the precarious financial state of a member bank could be closed under this provision. A securities and Exchange Commission discussion whether to suspend trading in a certain stock would also be included. Certain extremely sensitive financial actions cannot be disclosed until several months after they are taken. The wording therefore applies to an agency discussion of action already taken, as well as to a proposed action. This exemption, as all others, is prefaced by the phrased "can reasonably be expected" to disclose certain information. An agency seeking to close a meeting would therefore not have to conclude to an absolutue certainty that serious speculation would occur.

Subparagraph (B) applies to actions by any agency when premature disclosure of its plans would seriously frustrate effective implementation of its actions. An example would include discussion of the strategy an agency will follow in collective bargaining with its employees. Public disclosure might make it impossible to reach an agreement. Or an agency may consider imposing an embargo on the foreign shipment of certain goods. If this were publicly known, all the goods might be exported before the agency had time to act, and the effectiveness of the proposed action destroyed. The discussion could involve

agency approval of a proposed merger, if premature public disclosure of the proposal would make it impossible for the two sides to reach an agreement.

Subparagraph (C) applies to premature disclosure of an agency's plans to purchase a particular piece of land for itself. Public knowledge of the proposed action might drive up the price of the parcel under consideration, or lead to considerable land speculation.

The last sentence in paragraph (7) provides that an agency may not close a meeting pursuant to this paragraph if it has already publicly announced the content or nature of the action under consideration. Since the paragraph only applies when an agency feels it must act in secret, it would be contrary to the intent of this provision for an agency to rely on it when the public is already aware of the actions being considered, or where the Administrative Procedure Act or other statute requires the agency to publicly announce its proposal before taking final action. Thus, if an agency has already announced a proposed rule, or generally disclosed the nature or content of its proposed action, or if it must do so under the requirements of the Administrative Procedure Act before finally adopting the rule, discussion of the proposal to issue a rule, or take other action, could not be closed under this paragraph. Discussion of a complaint that has already been issued, or which must be issued, before final agency action is taken may be closed under other paragraphs, but not this one. The proviso in the last sentence of the paragraph will be applicable even if an agency has not already disclosed the exact wording of the proposal, or disclosed every detail of a proposed action. If the agency has already disclosed enough of the content or nature of the rule to give the public an idea of what the agency is proposing, it may not invoke paragraph (7).

The words "serious" and "seriously" qualify both subparagraphs (A) and (B). Without such a qualification, the provision could be read as endorsing a closed meeting even though, for example, the amount of speculation it might produce would be insignificant, or implementation of a proposed action would only be minimally "frustrated" by an open meeting. "Serious" means that there must be a balancing test, just as elsewhere in this bill, to determine how the public interest is best served.

Section 201(b)(8). This paragraph applies to meetings which disclose information contained in or relating to examination, operating, or condition reports on financial institutions. These reports are prepared by or for the use of such banking agencies as the Federal Reserve Board, Federal Deposit Insurance Corporation, and the Federal Home Loan Bank Board. This provision is identical to exemption (b)(8) of the Freedom of Information Act and should be interpreted in the same way.

Section 201(b)(9). This paragraph applies to meetings concerning the agency's participation, or preparation to participate, in a civil action in Federal or State court, or the initiation, conduct, or disposition of agency adjudication governed by section 554 of title 5, United States Code, or similar provision.

The first portion of the paragraph applies to an agency discussion of its participation in a civil action in Federal or State court. This

includes discussions concerning whether the agency should either bring an action itself or ask the Department of Justice to bring it. The second portion of the paragraph refers to formal adjudications conducted by the agency itself. The paragraph refers to an adjudication "otherwise involving a determination on the record after opportunity for a hearing" in order to include formal agency adjudications on the record not governed by section 554 of the Administrative Procedure Act. The paragraph only covers proceedings which follow sections 556 and 557 of the Administrative Procedure Act, or similar procedures.

The committee felt that it would be inappropriate for several reasons to require agencies to open meetings discussing specific cases of adjudication. Public disclosure of an agency's legal strategy in a case before the agency or in the courts could make it impossible to litigate successfully the action. Public discussions of the guilt or innocence of a particular individual in agency adjudication could unfairly injure a person's reputation, or make it impossible for him to receive a fair or impartial hearing. Adjudications of the type covered by this paragraph must already be decided solely on the information in the record. Unlike other cases, the entire record on which the agency must make its decision in adjudication is open to inspection by any member of the public. Section 202 of the bill, prohibiting ex parte contacts, will help insure that such decisions are in fact based solely on the record. Finally, many aspects of the adjudicative process, such as the trial before an administrative law judge or appellate arguments before the commission are generally open now to the public.

To fall within the provisions of this paragraph the discussion must concern a particular case of adjudication. If the agency discusses a particular series of cases, each of which meets the requirements of this paragraph, the meeting may also be closed. The paragraph would not apply when an agency discusses its adjudication policies in general, such as the policy that should be adopted towards all those that may violate a particular law.

Although a proceeding may technically involve an agency adjudication or proceeding in district court, it may still be possible for the agency to open its deliberations to the public. For instance, the agency may only be discussing a legal point. Or the discussion may involve a formal rule making proceeding where general agency policy, rather than the facts of a particular case, are determinative. Holding such meetings in the open would increase public understanding of the laws the agency administers, and the agency's interpretation of them. In other cases, a particular aspect of the adjudicative process may be required by other law to be open. In such event, this provision would not permit an agency to close a meeting otherwise required to be open.

Section 201(b)(10). This paragraph applies to meetings which involve information required to be kept secret by another statute. In such case, the agency must close its meetings notwithstanding the permissive nature of section 201(b).

Statutes which permit Government officials to withhold information on general discretionary grounds such as "in the public interest" are not included here. Thus, the statute involved in *Administrator, FAA* v. *Robertson*, 95 S. Ct. 2140 (1975), would not qualify for this exemption. Nor would the provisions of the Freedom of Information Act

apply since that statute permits but does not require the agency to keep any information from the public. The provision only refers to statutes which require specific types of information to be withheld from the public, or which describe by particular criteria the type of information that must not be disclosed. For example, individual's income tax return could be discussed in private under this provision, pursuant to 26 U.S.C. 6103. The limitations on the public disclosure of information imposed on agencies by the Privacy Act, 5 U.S.C. 552a(b), would also apply. The statute governing disclosure of information about complaints received by the Equal Employment Opportunity Commission, 42 U.S.C. 2000e–5(b), would come within this paragraph.

Section 201(c). Subsection (c) establishes the procedures an agency must follow if it wishes to close a meeting under subsection (b). The subsection will be inapplicable when an agency meeting remains open. In those cases where an agency meeting must be closed, this subsection permits closure in a way that will not interfere with the efficient or expeditious conduct of agency business.

Paragraph (1) provides that a meeting may be closed only by a majority vote of the entire membership of the agency. The vote of a simple majority of a quorum would not suffice to close the meeting. Subdivisions of the agency are subject to the same requirements. Each vote must be recorded and must be made public by the agency within one day. Where a meeting of agency heads is convened to discuss the matter, no proxies are allowed. The voting procedures specified in paragraph (1) are equally applicable to the other votes an agency may be required to take pursuant to this bill. Closing an agency meeting, or denying the public information about it, is a significant decision. It should not be taken without the concurrence of a majority of the entire body, and in accordance with the other procedures specified in this paragraph.

If an agency needs to close only certain portions of a meeting, its vote must be in specific reference to those portions. It is recognized in section 201 that an agency may have to close a portion of a meeting, but that the remainder of the meeting may remain open. In such cases the closed portions of the meeting are governed by the same procedures as if it were a separate meeting. Thus references throughout section 201 to meetings that an agency wishes to close are also intended to refer to a portion or portions of a meeting which an agency wishes to close.

Generally, a separate vote must be taken on each meeting, or portion of a meeting, the agency wishes to close. A single vote can be taken, however, to close a series of meetings, where all the meetings will be held within a 30-day period and involve the same "particular matters." The latter phrase means more than general similarity of content. It must involve the same agenda item, such as a particular bank application, a proposal to suspend trading in a particular security, or the like. This provision was added so that the agency would not have to vote repeatedly on whether to close the same discussion which stretches over more than one meeting. The procedures governing the closing of meetings also apply should an agency wish, pursuant to subsection (b), to withhold information about the meeting otherwise required by subsections (c) and (d) to be disclosed.

Agency members will not normally need to meet to decide whether to close a subsequent meeting or to decide upon the agenda for the meeting. It is anticipated that the agencies will instead use notation voting, or similar procedures, to determine whether to close the meeting. As is currently the case, the agenda may be prepared by informal means which do not require the convening of all the agency heads. Nothing in this subsection is intended to prohibit such procedures. If, however, a matter of unusual importance has generated great public interest, the agency heads may choose to have a separate preliminary meeting to decide whether to close a meeting. Where the agency has such a preliminary meeting, it too would have to be open unless closed pursuant to subsection (b). Such a meeting would be subject to the same notice requirements, and exceptions, as any other meeting.

In some cases a person may believe that an agency meeting directly affecting him would constitute an invasion of personal privacy (section 201(b)(3)), accuse him of criminal charges (section 201(b)(4)), or disclose information affecting him in an investigatory file (section 201(b)(5)). The subsection specifically recognizes the right of a person in such circumstances to ask the agency to close the meeting. If one member of the agency concludes that the person may be directly and adversely affected by holding the meeting in public, the entire agency must vote on whether to close the meeting. The purpose of this clause is to insure that an agency considers any person's legitimate concern that an open meeting may harm him in a direct and personal manner. It should help guarantee, for instance, that an agency does not inadvertently overlook the possibility that a particular discussion, if held in public, would constitute an invasion of personal privacy or disclose the identity of a confidential source.

Section 201(c)(2). Paragraph (2) requires an agency to publish a full written explanation of its decision to close any meeting within one day of the vote to do so. A list of persons expected to attend the closed meeting, and their affiliations must accompany the explanation except as provided by subsection (b). The explanation should not only refer to the specific paragraph in subsection (b) which the agency is invoking, but explain why the specific discussion falls within the paragraph cited, the relative advantages and disadvantages to the public of holding the meeting in closed or open session, and why the agency concluded on balance that the public interest would best be served by closing the meeting. The explanation and the accompanying list need not disclose information described in subsection (b), where such disclosure would have the same undesirable effect as opening the meeting itself. In all but the most extraordinary circumstances, however, the agency should be able to give some specific explanation of its action. In such case, the agency must do so in as detailed terms as possible.

Section 201(c)(3). Paragraph (3) provides that any agency which will be closing a majority of its meetings under paragraph (6), (7)(A), (8), or (9) of subsection (b) may do so by regulation, and under expedited procedures. The agency can qualify under this subsection if it must close a majority of its meetings under any one of these paragraphs, or under two or more of these paragraphs. Paragraph (3) will largely apply to agencies which regulate financial institutions,

securities, or commodities, and which will often have to conduct their sensitive business in private, and on short notice. It will also apply to agencies whose primary or sole task is to conduct cases of adjudication. Agencies which may possibly issue regulations pursuant to these provisions include the Federal Reserve Board, the Securities and Exchange Commission, and the National Labor Relations Board.

The records of agency meetings over the past several years should indicate whether an agency may properly close a majority of its meetings under this paragraph. Even if it could close a majority of its meetings, an agency should examine whether it will really need to close such a large number of its meetings under the specific paragraphs cited in subsection (c)(3). Full recognition must be given to the fact that this bill establishes a new principle of openness that is equally applicable to all agencies.

The issuance of any regulations pursuant to subsection (c)(3) shall be governed by subsection (f). The regulations should fully document, on the basis of the past history of agency meetings, the likelihood that it will have to close a majority of its meetings pursuant to paragraph (6),(7)(A), (8) or (9). The regulation should also specify in detail the types of meetings to which the regulations apply and which exemption is relied upon as the grounds for closing each type of meeting.

An agency that has properly issued such regulations may announce in advance of a particular meeting that it proposes to close the meeting pursuant to its regulations. The agency then need only vote at the beginning of the meeting itself that the meeting should in fact be closed.

An agency which operates under regulations authorized by this paragraph need not comply with the remainder of subsection (c), or the notice requirement imposed by subsection (d), with respect to any meeting closed by regulation. One-week notice to the public of the meeting would not be necessary. The agency must, however, provide a public announcement of the date, place, and subject matter of the meeting at the earliest practicable opportunity. This announcement should be similar to that required by subsection (d). Disclosure of information about a meeting governed by subsection (c)(3) is also subject to subsection (b), so that information otherwise required to be disclosed in the public announcement of the meeting, may be withheld if it falls within the provisions of subsection (b). As used in this subsection, the term "earliest practicable opportunity" has the same meaning as in subsection (d). If an agency subject to this paragraph wishes to change the subject matter of a previously announced meeting, it may do so at the earliest practicable opportunity, just as in the case of a meeting governed by subsection (d).

Section 201(d). This subsection requires advance public notice of all agency meetings. Such information must be made available by an agency in order to make the public's right to attend a meeting meaningful.

The subsection requires the agency in most cases to publicly announce the date, place, subject matter of a meeting, and whether open or closed, at least one week beforehand. The identification of the subject matter must be adequate to inform the general public thoroughly, referring, for example, to a specific docket number, the name of the

applicant, the identity of the proposed rule, and the like. Reference to a generic subject matter, such as "consumer complaints," or "applications for new routes," does not meet the requirements of this subsection.

If a majority of the entire membership of the agency votes that agency business requires a meeting to be held with less than 7 days notice, the required public notice must still be provided at the earliest practicable date. This provision allows agencies to schedule a meeting where consideraion of an emergency matter can not be delayed 7 days. It recognizes that the public interest in obtaining rapid agency action may at times override the public interest in receiving advance notice of meetings. This clause does not, however, allow an agency to wait until the last moment to schedule a meeting, when agency business truly requires it, if the meeting could have been scheduled in time to give the public a week's notice.

When notice of a meeting is provided less than 7 days in advance, it must still be provided "at the earliest practicable opportunity." In most cases this should still permit several days notice to the public. If the need is genuine, however, the announcement may be made only hours in advance of the meeting. In the unusual case, the announcement may have to be issued simultaneously with the convening of the meeting. Or a meeting which has already started as an open one, may suddenly have to be closed if some sensitive matters unexpectedly arises. Even if, in such circumstances, the public does not in fact learn of the meeting until after it has occurred, the announcement must be made to provide a record of such meetings.

After a meeting is scheduled and public announcement provided, the subject matter of the meeting or the decision to open or close the meeting, may be changed if two conditions are satisfied. First, a majority of the entire membership of the agency must vote that agency business requires the change, and that earlier announcement of the change was not possible. Second, an agency must publicly announce the change at the earliest practicable opportunity. The same considerations as discussed above apply to the timing and nature of such announcements.

This procedure anticipates cases when agency business requires that a matter be added to an agenda on a few days or even a few hours notice. For example, a motor carrier may apply for an emergency temporary operating license in order to provide fuel, food, clothing or the like to those who need it immediately. Agency action within days or hours may be necessary. In such a case, the matter could be added to the already announced agenda of the meeting, or the agency could call a separate meeting to consider the matter. The decision to close a meeting previously open to the public might also occur on short notice, or even at the meeting itself, when a new subject or new facts arise. The provision is designed to provide the flexibility necessary to insure expeditious agency action.

Whenever an agency provides public announcement of its meetings, it should use a variety of means to insure that the information reaches the public as quickly and reliably as possible. Agencies may wish to issue a weekly calendar of scheduled meetings. Such calendars could be mailed to those who express special interest in being informed about the agency's activities. Agencies should also use public bulletin boards, press releases, and recorded telephone messages de-

scribing the status of agency meetings scheduled for the next 7 days. There is no requirement that announcement of the meeting or any changes made concerning such meetings appear in the Federal Register prior to the meeting. However, this should be done whenever possible. In any event, the information must be printed in the Federal Register as soon as possible following the first public announcement. Even if this does not occur until after the meeting, such notice will provide a record of all agency meetings in a single publication widely available to members of the public.

The subsection also requires an agency, when announcing its meetings, to include the name and telephone number of an agency employee whom the public may contact for more information about the meeting. This is a practice already followed with success by some agencies in connection with meetings between agency officials and members of the public.

Section 201(e). This subsection requires that a complete verbatim transcript or electronic recording be made of each meeting the agency votes to close, unless it is a meeting concerned solely with adjudicative matters covered by subsection 201(b)(9). Where an agency makes an electronic recording of the meeting, rather than a written transcript, the tape should be coded, or other records kept, adequate to identify each speaker. The agency must on its own initiative promptly provide to the public the complete transcript or electronic recording of any item on the agenda where no significant portion of its discussion would disclose information falling within subsection (b). If only one or two brief references to sensitive matters were made in a lengthy discussion of an item on the agenda, the record of the discussion, minus the one or two references, must be made public. Agencies need not edit a transcript or electronic recording of the Commission's discussion of a particular matter word by word so as to make abbreviated portions of the record of the meeting available to the public. Where sensitive matters are an integral part of the record of the discussion of a matter, no part of the record need be made public. The reference to each item on the agenda, or the testimony of each witness, includes each easily identifiable segment of a meeting. Even if an agency does not in fact have a formal agenda for the meeting, or receive testimony, the phrase would include the agency's discussion of each separate issue or other equivalent matter which it takes up at the meeting.

The subsection does not require the agency to follow any specified procedure in determining whether to make the record of a meeting available to the public. It does not require, for example, that a record of the vote be provided the public, or even that a formal vote on the matter be taken.

The requirement that agencies keep a transcript or electronic recording of a closed meeting constitutes an integral part of the open meeting requirements of the bill. Subsection (e) should be used to inform the public about the bulk of the discussion of any item on the agenda where the consideration of sensitive matters occurs in an easily identifiable segment of the discussion occupying only a small portion of the time devoted to the entire agenda item. Or it may be that an entire discussion does not in fact involve any sensitive matters jusifying the closing of a meeting, even though the agency reasonably expected it

would when it closed the discussion. In yet other instances a meeting will be closed because it involves matters which are sensitive at the time, such as the regulation of financial institutions, that would cause financial speculation if disclosed prematurely. Later, however, the discussion's sensitive nature may disappear. An agency must then publicly release the record of its meeting at a later date when paragraph 7 no longer applies. Finally, subsection (e) will permit interested members of the public to learn what transpired at a meeting which a court later holds was improperly closed.

The transcripts and recordings that may be made public must be promptly placed in a public document room. The agency must do this on its own initiative, rather than waiting until it receives a particular request. Where a meeting was unnecessarily closed to the public it should take the agency a week or less to make the record available to the public. The room for storing the transcript or electronic recording must be easily accessible to the public in an unrestricted area of the building. In the case of electronc recordings some provision must, of course, be made to permit members of the public to listen to them, and to identify each speaker. Copies of transcripts, or transcriptions of the tapes identifying all speakers, must be provided at the actual cost of duplication or transcription. If a person requests a copy of a tape, rather than a transcription of it, this should also be provided at the actual cost of copying.

When people ask for copies of the records of meetings available to the public, agencies should follow procedures similar to those adopted under the Freedom of Information Act, 5 U.S.C. section 552(a)(4)(A). Regulations should be promulgated, pursuant to subsection (f), which specify a uniform schedule of fees. The fees should be limited to reasonable standard charges for duplication. which may include appropriate pro rata labor costs. Fees should not be used to discourage requests for copies of the record of a meeting. Documents should be furnished at a reduced or zero charge when the agency determines that such action is in the public interest, or will primarily benefit the general public.

The transcripts or tapes must be maintained by the agency for 2 years, or for 1 year after the conclusion of the proceeding to which they relate, whichever occurs later. If an agency discusses the initiation of a proposed investigation at a closed meeting, the record should be retained until the investigation. and any agency adjudication arising from it, is completed and final agency action taken.

Section 201(f). This subsection requires each agency to promulgate regulations implementing the requirements of subsections (a) through (e) within 180 days after enactment of the act. The regulations should, for example, describe how the agency will publicly announce its meetings, establish procedures for closing meetings where necessary, specify how the public can obtain records of formerly closed meetings, and at what cost. Any agency that invokes the provisions of subsection 201(c)(3) must issue implementing regulations pursuant to this subsection.

If an agency does not promulgate regulations within 180 days, any person may bring a proceeding in the U.S. District Court for the District of Columbia to compel issuance of the regulations. Any per-

son has the right to challenge the adequacy of the regulations that are issued by the agency in the District of Columbia of Appeals. A person may invoke this provision, for instance, to challenge the applicability of subsection (c)(3) to a particular agency. If an issue is too speculative or remote, the Court of Appeals may refuse to entertain the suit. Any person has standing to bring an action since the bill is designed to protect the right of the general public to attend agency meetings. Thus, standing to bring action under this section cannot be limited to only those persons who may be directly affected by particular agency action taken at the meeting. Any person with sufficient interest in the matter to want to bring suit under this section will be able to do so.

Section 201(g). This subsection gives the U.S. district courts jurisdiction to enforce the requirements of subsections (a) through (e) by declaratory judgment, injunction, or other appropriate relief. Any person may bring an action in the district where he resides or has his business, or where the agency is headquartered, prior to or within 60 days after, the meeting to which the violation relates. If the agency fails to announce the meeting when required by subsection (d), the suit may be brought within 60 days after the date that any public announcement is actually made. If an agency provides no public announcement at all, the 60-day requirement is inapplicable.

Before instituting a suit, the plaintiff must first notify the agency and give it a reasonable period of time, not to exceed 10 days, to correct the violation, or to prevent it from occurring in the first place. If the plaintiff is seeking to open a meeting which has not yet been held, he need not give the agency more than 2 days to act. Under certain circumstances, reasonable notice will be less than the maximum possible period. Where the meeting will be held in less than 2 days, for example, a reasonable length of time might be only several hours. While a person waits for a response to his request that the agency correct an asserted violation, the 60-day statute of limitations shall be tolled.

It is important that actions brought under this subsection be handled expeditiously in order for public participation to be meaningful. Accordingly, the defendant must serve his answer within 20 days after service of the complaint.

The burden of proof is on the agency to sustain its conduct. This is in accord with the presumption of openness established in the bill. Those who wish to operate in secrecy should have to justify it. Furthermore, in most cases the agency will be the only party in possession of information that might justify closing the meeting. The burden must therefore be on the agency to produce any facts that may support its action. In deciding cases, the court may examine in camera any transcript or recording of a closed meeting, and take additional evidence as needed. In appropriate cases, it may also permit attorneys for all parties to examine the record of the meeting and argue the case in camera.

Under subsection (g) the court may grant appropriate equitable relief. This may include ordering an agency to open a meeting it had planned to close, ordering the release of the record of an improperly closed meeting, or issuing a declaratory judgment.

The subsection specifically provides that it does not confer any jurisdiction on district courts to invalidate agency action taken at an illegally closed meeting. This provision is also intended to prohibit the district court from enjoining any action taken at an improperly closed meeting, or compelling the agency to take any action, where the action in question is not directly related to the requirements of this bill. Any relief the district court does grant pursuant to this subsection is subject to the requirement that it be with due regard for orderly administration and the public interest, as well as the interests of the parties. Normally it should not be necessary for a court to enjoin the holding of a meeting in order to correct violations of this section. The court may do so, however, where, for example, the agency's violation is flagrant, or where the matter does not demand immediate action, and the public interest in the matter is great.

As in the case of subsection (f), any member of the public has standing to bring suit under this subsection. The subsection authorizes suit to be brought against an individual member of the agency, as well as the agency itself. This provision is required by subsection (i), which permits a court to assess costs against an individual member of an agency in certain extraordinary cases. As in other instances when a Government official is named as a defendant in a suit, the Federal Government should defend individual agency members sued under this subsection.

Section 201(h). This subsection allows any Federal court otherwise authorized by law to review other agency action to also review an agency's compliance with this section. If the action an agency took at a closed meeting was not otherwise reviewable by the court, this subsection would not make that action, or the agency's compliance with this subsection reviewable. Review of agency compliance with this section may be conducted under this subsection at the request of any person who may otherwise properly participate in the judicial review proceeding pursuant to 5 U.S.C. section 702, or other applicable law. For example, a company challenging the validity of an agency rule, may include in its challenge the fact that the agency adopted the rule in a meeting improperly closed to the public.

The reviewing court can afford any relief it deems appropriate. This may include ordering the release of a transcript of an improperly closed meeting. It may also include reversing an agency action on the grounds that it was taken at a meeting improperly closed to the public. It is expected that a court will reverse an agency action solely on such grounds only in rare instances where the agency's violation is intentional and repeated, and the public interest clearly lies in reversing the agency action.

Section 201(i). This subsection allows the court to assess against any party the reasonable attorney fees and other litigation costs incurred by any party who substantially prevails in an action brought pursuant to subsection (f), (g), or (h). Other litigation costs may include reasonable fees for attorneys and expert witnesses. This portion of the subsection is based on similar provisions in the Freedom of Information Act (5 U.S.C. 552(a)(4)(E)) and the Privacy Act (5 U.S.C. 552a(g)(2)(B)).

Cost may be assessed against an individual agency member, rather than against the agency itself or the United States, only when the

agency member has intentionally and repeatedly violated section 201. Costs may only be assessed against the plaintiff under this subsection when he has brought a suit for frivolous or dilatory reasons. The committee feels these provisions will, on the one hand, help assure compliance with the section, and, on the other hand, prevent unnecessary litigation against an agency already in compliance.

Section 201(j). This subsection requires agencies subject to section 201 to annually report to Congress on their compliance with the section. The report must include the number of meetings open and closed to the public, reasons for closing the meetings, and a description of any litigation brought against the agency under this section.

SECTION 202—PROHIBITION OF EX PARTE COMMUNICATIONS

Section 202(a). This subsection amends the provisions of the Administrative Procedure Act governing adjudication and formal rulemaking (4 U.S.C. 557) by establishing a broad prohibition against ex parte communications in such formal, trial-type proceedings. It applies to all agencies governed by the Administrative Procedure Act, whether or not the agency is subject to section 201 of the bill. Such a prohibition is presently implied by section 556(e) of the Administrative Procedure Act which states that "the transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitute the exclusive record for decision." Yet the act contains no general statutory prohibition against ex parte contacts. If a court now wishes to invalidate an agency proceeding because of ex parte contacts, it must rely on constitutional standards, rather than specific provisions. See e.g., *Sangamon Valley Television Corp.* v. *F.C.C.*, 269 F. 2d 221 (1959). Section 202 provides for the first time a clear, statutory prohibition of ex parte contacts of general applicability.

The prohibition only applies to formal agency adjudication. Informal rulemaking proceedings and other agency actions that are not required to be on the record after an opportunity for a hearing will not be affected by the provision.

The ex parte rules established by this section do not repeal or modify the ex parte rules agencies have already adopted by regulation, except to the extent the regulations are inconsistent with this section. If an agency already has more stringent restrictions against ex parte contacts, this section will supplement those provisions. It is expected that each agency will issue new regulations applying the general provisions of this section in a way best designed to meet its special needs and circumstances.

The rule forbids ex parte communications between interested persons outside the agency and agency decisionmakers. The provision exempts only those ex parte communications authorized by law to be disposed of in such a manner. This exemption includes, for example, requests by one party to a proceeding for subpenas, adjournments, and continuances.

Paragraph (1) forbids contacts between an interested person outside the agency and any agency member, administrative law judge, or other employee involved in the decisionmaking process. The word "employee" includes both those working for the agency full time and individuals working on a part-time basis, such as consultants.

The wording "interested persons" is intended to be a wide, inclusive term covering any individual or other person with an interest in the agency proceeding that is greater than the general interest the public as a whole may have. The interest need not be monetary, nor need a person be a party to, or intervenor in, the agency proceeding to come under this section. The term includes, but is not limited to, parties, competitors, public officials, and nonprofit or public interest organizations and associations with a special interest in the matter regulated. As used in this section, "person" has the same meaning as elsewhere in the Administrative Procedure Act.

The rule applies to interested persons who "make or knowingly cause to be made" an ex parte communication. The latter phrase contemplates indirect contacts which the interested person approves or arranges. For example, an interested person may ask another person outside the agency to make an ex parte communication. The section would apply to the individual who requested that the communication be made. However, if the second person contacts the agency about the first individual's interest in the case without that person's knowledge, approval, or encouragement, the first person would not be guilty of knowingly causing an ex parte contact.

Contacts are prohibited with any agency members, administrative law judge, or other employee who is or may reasonably be expected to be involved in the agency's deliberations. The words "may reasonably be expected" make it clear that absolute certainty is not required when predicting whether an agency employee will be involved in the decisional process. In some cases it will be clear that an employee does not come within the ambit of the provision. For example, an agency attorney litigating the case for the agency will not be involved in the decisionmaking process of the agency and would not be subject to the ex parte provision. Under other circumstances, the official's status may not be so clear. In such case, the fact that an interested person chooses to communicate with a particular employee in an ex parte manner is itself some evidence that the official may reasonably be expected to be involved in the decisional proceess. To assist the parties and the public in determining which agency officials may be involved in the decisional process, an agency may wish to publish, along with notice of the proceeding, a list of officials expected to be involved in the decisional process. The ex parte rules would still apply to an agency official involved in the decisional process even if he were not on such a list.

Communications solely between agency employees are excluded from the section's prohibition. Of course, ex parte contacts by staff acting as agents for interested persons outside the agency are clearly within the scope of the prohibitions.

The subsection prohibits an ex parte communication only when it is "relevant to the merits of the proceeding." This phrase is intended to be construed broadly and to include more than the phrase "fact in issue" currently used in the Administrative Procedure Act. The phrase excludes procedural inquiries, such as requests for status reports, which will not have any effect on the way the case is decided. It excludes general background discussions about an entire industry which do

not directly relate to specific agency adjudication involving a member of that industry, or to formal rulemaking involving the industry as a whole. It is not the intent of this provision to cut an agency off from access to general information about an industry that an agency needs to exercise its regulatory responsibilities. So long as the communication containing such data does not directly discuss the merits of a pending adjudication it is not prohibited by this section.

A request for a status report or a background discussion about an industry may in effect amount to an indirect or subtle effort to influence the substantive outcome of the proceedings. The judgment will have to be made whether a particular communication could affect the agency's decision on the merits. In doubtful cases the agency official should treat the communication as ex parte so as to protect the integrity of the decisionmaking process.

Paragraph (2) is the inverse of paragraph (1). It prohibits agency officials who are or who may be involved in the decisional process from engaging in an ex parte contact with an interested person. It embodies the same standards as paragraph (1).

Paragraph (3) states that if an ex parte communication is made or received by an agency official, he must place on the proceeding's public record: (A), any illegal written communication, (B), a memorandum stating the substance of any illegal oral communication, and (C), any oral or written statements made in response to the original ex parte communication. The "public record" of the proceeding means the public docket or equivalent file containing all the materials relevant to the case readily available to the parties and the public generally. Material may be part of the public record even though it has not been admitted into evidence.

The purpose of this provision is to notify the opposing party and the public, as well as all decisionmakers, of the improper contact and give all interested persons a chance to reply to anything contained in the illegal communication. In this way the secret nature of the contact is effectively eliminated. Agency officials who make an ex parte contact are under the same obligation to record it publicly as when an agency official receives such a communication. In some cases, merely placing the ex parte communication on the public record will not, in fact, provide sufficient notice to all the parties. Each agency should consider requiring by regulation that in certain cases actual notice of the ex parte communication be provided all parties.

Paragraph (4) states that the officer presiding over the agency hearings in the proceedings may require a party who makes a prohibited ex parte communication to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded or otherwise adversely affected because of the violation. This provision accompanies section 202(d), which authorizes an agency to consider a violation of this section as grounds for ruling against a party on the merits. Paragraph (4) insures that the record of the proceeding contains adequate information about the violation. The presiding officer need not require a party committing an ex parte contact to show cause in every instance why the agency should not rule against him. The matter rests within his discretion. As in the case of

subsection (d), the presiding officer should require such a showing only if consistent with the interests of justice and the policy of the underlying statutes. Thus a showing should be required where, among other factors, there is a reasonable likelihood that the illegal contact will be shown to have been made knowingly, but not where the violation was clearly inadvertent.

Paragraph (5) requires that the prohibitions against ex parte communications apply as soon as a proceeding is noticed for a hearing. However, if a person initiating a communication before that time is aware that notice of the hearings will be issued, the prohibitions would apply from the time the person gained such awareness. An agency, if it wishes, may require that the provisions of this section apply at any point in the proceedings prior to issuance of the notice of hearings.

Section 202(b). This subsection is only a conforming amendment. It deletes from the Administrative Procedure Act the limited provision in section 554(d) now governing ex parte communications. This part of the present law is no longer necessary upon adoption of section 202(a).

Section 202(c). This subsection adds a definition of "ex parte communication" to the definitions contained in the Administrative Procedure Act. The term includes an "oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given." A communication is not ex parte if either, (1) the person making it placed it on the public record at the same time it was made, or (2) all parties to the proceeding had reasonable advance notice. If a communication falls into either one of these two categories, it is not ex parte. Where advance notice is given, it should be adequate to permit other parties to prepare a possible response and to be present when the communication is made. As in subsection (a), "public record" means the docket or other public file containing all the material relevant to the proceedings. It includes, but is not limited to, the transcript of the proceedings, material that has been accepted as evidence in the proceeding, and the public file of related matters not accepted as evidence in the proceeding. An individual who writes a letter concerning the merits of the proceeding to a commissioner, and who places a copy of the letter at the same time in the transcript of the proceedings, would not have made an ex parte communication. However, a party who wrote the same letter and sent it only to a commissioner, would have committed a violation of the section even if the commissioner subsequently placed the letter in the public record.

Section 202(d). This subsection amends section 556(d) of title 5, so as to authorize an agency to render a decision adverse to a party violating the prohibition against ex parte communications. It is intended that this provision apply to both formal parties, and to intervenors whose interests are equivalent to those of a party. This possible sanction supplements an agency's authority to censure or dismiss an official who engages in an illegal ex parte communication, or to prohibit an attorney who violates the section from practicing before the agency. Such an adverse decision must be "consistent with the interests of justice and the policy of the underlying statutes." For

80-459 O - 77 - 16

example, the interests of justice might dictate that a claimant for an old age benefit not lose his claim even if he violates the ex parte rules. On the other hand, where two parties have applied for a license and the applications are of relatively equal merit, an agency may rule against a party who approached an agency head in an ex parte manner in an effort to win approval of his license.

The subsection specifies that an agency may rule against a party for making an ex parte communication only when the party made the illegal contact knowingly. An inadvertent ex parte contact must still be remedied by placing it on the public record. If the agency believes that such an unintentional ex parte contact has irrevocably tainted the proceeding, it may require the parties to make a new record. However, the committee concluded that an agency should not definitively rule against a party simply because of an inadvertent violation.

It is expected that an agency will rule against a party under this subsection only in rare instances. However, the committee felt it very important that an agency have this option available where the circumstances justify it, and where the agency must emphasize the seriousness with which it views violations of the ex parte rules.

SECTION 203—EFFECT ON OTHER LAWS

Section 203(a). This subsection provides that nothing in section 201 increases or decreases the public's access to documents or other records under the Freedom of Information Act, 5 U.S.C. section 552. Access to the actual documents or other written matter discussed or referred to at a meeting subject to section 201 will continue to be governed, as before, by the Freedom of Information Act.

The availability of transcripts or electronic recordings required by section 201(e) are exempted from this general rule. Section 201(e) imposes a separate responsibility on an agency to keep verbatim records and to make them available to the public on its own initiative unless they concern matters falling within subsection (b) of section 201. If an agency properly withholds the transcripts or electronic recordings under section 201(e), it need not disclose the material pursuant to a Freedom of Information Act request, even though the nature of the information is such that it would otherwise have to be disclosed under that act.

Except to the extent section 201(e) is inconsistent, the other provisions of the Freedom of Information Act will continue to apply to the transcripts or electronic recordings of meetings, and to any request made under the Freedom of Information Act for access to such records. Thus, the transcripts or electronic recordings must be indexed in accordance with the Freedom of Information Act and publicly disclosed except to the extent section 201(b) would apply to such information. An agency response to a request under the Freedom of Information Act for a transcript or electronic recording of a meeting would be subject to the time limits for agency action established by that act. A member of the public may invoke the enforcement provisions of that act to insure that agency treatment of the transcripts or electronic recordings comply with its provisions.

Section 203(a) also provides that the storage of transcripts or electronic recordings required by section 201(e) are not subject to the Federal Records Act, chapter 33 of title 44, United States Code. Such material need not be kept beyond the period specified in section 201(e). The committee expects, however, that in accordance with the principles established in the Federal Records Act, the agency will choose to permanently retain transcripts or electronic recordings of meetings of special interest. This subsection also specifies that nothing in title II authorizes the withholding of any information from Congress.

Section 203(b). This subsection states that section 201 may not be used to deny requests by an individual for information under the Privacy Act, section 552a of title 5, United States Code, including information which might be contained in transcripts or electronic recordings of properly closed meetings. The principles of the Privacy Act govern whether or not an agency may withhold information from the public in general. The applicability of the Privacy Act should in no way be limited by enactment of this bill.

SECTION 204—EFFECTIVE DATE

This section provides that title II will become effective 180 days after enactment. The provisions of 201(f), requiring the promulgation of regulations within 180 days from enactment, become effective immediately. This will assure that agencies will have promulgated the necessary regulations, and have established the necessary procedures, to allow complete compliance with section 201 once it does become effective. The 180-day period will also give the agencies an opportunity to review their regulations governing ex parte contacts and to revise them in accordance with section 202 of the bill.

Estimated Cost of the Legislation

It is estimated that title I, opening meetings of congressional committees, and section 202 of title II, regulating ex parte contacts in formal agency procedings, will impose no additional cost.

While it is difficult to estimate the probable cost of section 201, it is anticipated that most of the added cost will be for additional clerical and administrative work required by the section. The committee estimates that this additional cost will be minimal.

Open meetings will require no tape recorders, no transcripts and no editing of tapes. The only cost to an agency of an open meeting will be the very small cost of providing the necessary public announcement. An agency closing a meeting will have the additional cost of making a transcript of the proceeding, or the cost of making an electronic recording. The estimated cost of section 201 will therefore depend on the number of meetings closed to the public. Since most of the agency meetings should be open to the public, the committee expects that the total cost of transcripts for closed meetings will be relatively minor. The cost of the verbatim record will be further reduced if an agency relies on an electronic recording. The cost of electronic equipment has been estimated to be only a few thousand dollars per agency. The cost of providing copies of the transcripts or tapes to the public will be borne by the member of the public requesting the copy.

In a few cases, section 201 may require an agency to hire one additional employee to handle the added cherical and administrative work.

Rollcall Vote in Committee

In compliance with section 133 of the Legislative Reorganization Act of 1946, as amended, the rollcall vote taken during committee consideration of this legislation is as follows:

Final Passage: Ordered Reported: 8 yeas—0 nays.

Yeas:

Chiles
Nunn
Glenn
Ribicoff
Percy
Javits
Roth
Brock
(Proxy)
Jackson
Muskie
Metcalf
Weicker

Nays:

Changes in Existing Law

In compliance with subsection 4 of rule XXIX of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, and existing law in which no change is proposed is shown in roman):

(2 U.S.C. 72a note)

LEGISLATIVE REORGANIZATION ACT OF 1946 AS AMENDED THROUGH MARCH 7, 1975

* * * * * * *

TABLE OF CONTENTS

Title 1—Changes in Rules of Senate and House

Sec. 101. * * *

* * * * * * *

Part 3—provisions applicable to both houses

* * * * * * *

Sec. 133B. * * *

Sec. 133C. Open Senate committee meetings.
Sec. 133D. Open conference committee meetings.
Sec. 133E. Open joint committee meetings.

TITLE I—CHANGES IN RULES OF SENATE AND HOUSE

RULE-MAKING POWER OF THE SENATE AND HOUSE

SEC. 101. * * *

* * * * * * *

COMMITTEE PROCEDURE

(2 U.S.C. 190a)

SEC. 133. (a) * * *

(b) [Meetings for the transaction of business of each standing committee of the Senate, other than for the conduct of hearings, shall be open to the public except during executive sessions for marking up bills or for voting or when the committee by majority vote orders an executive session.] Each such committee shall keep a complete record of all committee action. Such record shall include a record of the votes on any question on which a record vote is demanded. The results of rollcall votes taken in any meeting of any such standing committee of the Senate upon any measure, or any amendment thereto, shall be announced in the committee report on that measure unless previously announced by the committee, and such announcement shall include a tabulation of the votes cast in favor of and the votes cast in opposition to each such measure and amendment by each member of the committee who was present at that meeting.

* * * * * * *

SENATE COMMITTEE RULES

(2 U.S.C. 190a–2)

SEC. 133B. * * *

OPEN SENATE COMMITTEE MEETINGS

SEC. 133C. Each meeting of a standing, select, or special committee of the Senate, or any subcommittee thereof, shall be open to the public, except that a portion or portions of any such meeting may be closed to the public if the committee or subcommittee, as the case may be, determines by record vote of a majority of the members of the committee or subcommittee present that the matters to be discussed at such portion or portions—

(1) will disclose matters necessary to be kept secret in the interests of national defense or the foreign policy of the United States;

(2) will relate solely to matters of committee staff personnel or internal staff management or procedure;

(3) will tend to charge an individual with crime or misconduct, to disgrace or injure the professional standing of an individual, or otherwise to expose an individual to public contempt or obloquy, or will represent a clearly unwarranted invasion of the privacy of an individual;

(4) will disclose the identity of any informer or law enforcement agent or will disclose any information relating to the investigation or prosecution of any violation of law that is required to be kept secret in the interests of effective law enforcement; or

(5) will disclose information relating to the trade secrets or financial or commercial information pertaining specifically to a given person if—

(A) an Act of Congress requires the information to be kept confidential by Government officers and employees; or

(B) the information has been obtained by the Government on a confidential basis, and is required to be kept secret in order to prevent undue injury to the competitive position of such person.

This section shall not apply to meetings to conduct hearings.

OPEN CONFERENCE COMMITTEE MEETINGS

SEC. 133D. Each conference committee between the Senate and the House of Representatives shall be open to a clearly unwarranted invasion of the privacy of an individual;

(D) will disclose the identity of any informer or law enforcement agent or will disclose any information relating to the investigation or prosecution of any violation of law that is required to be kept secret in the interests of effective law enforcement; or

(E) will disclose information relating to the trade secrets or financial or commercial information pertaining specifically to a given person if—

(i) an Act of Congress requires the information to be kept confidential by Government officers and employees; or

(ii) the information has been obtained by the Government on a confidential basis, and is required to be kept secret in order to prevent undue injury to the competitive position of such person.

This clause shall not apply to meetings to conduct hearings.

OPEN JOINT COMMITTEE MEETINGS

SEC. 133E. Each meeting of a joint committee of the Senate and House of Representatives, or any subcommittee thereof, shall be open to the public, except that a portion or portions of any such meeting may be closed to the public if the committee or subcommittee, as the case may be, determines by record vote of a majority of the members of the committee or subcommittee present that the matters to be discussed or the testimony to be taken at such portion or portions—

(1) will disclose matters necessary to be kept secret in the interests of national defense or the foreign policy of the United States;

(2) will relate solely to matters of committee staff personnel or internal staff management or procedure;

(3) will tend to charge an individual with crime or misconduct, to disgrace or injure the professional standing of an individual, or otherwise to expose an individual to public contempt or obloquy, or will represent a clearly unwarranted invasion of the privacy of an individual;

(4) will disclose the identity of any informer or law enforcement agent or will disclose any information relating to the investigation or prosecution of any violation of law that is required to be kept secret in the interests of effective law enforcement; or

(5) will disclose information relating to the trade secrets or financial or commercial information pertaining specifically to a given person if—

(A) an Act of Congress requires the information to be kept confidential by Government officers and employees; or

(B) the information has been obtained by the Government on a confidential basis, and is required to be kept secret in order to prevent undue injury to the competitive position of such person.

This section shall not apply to meetings to conduct hearings.

CHAPTER 5, TITLE 5, U.S. CODE

§ 551. Definitions.

For the purpose of this subchapter—

(1) * * *

* * * * * * *

(12) "agency proceeding" means an agency process as defined by paragraphs (5), (7), and (9) of this section; [and]

(13) "agency action" includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to [act.] *act; and*

(14) "ex parte communication" means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given.

* * * * * * *

§ 554. Adjudications.

(a) * * *

* * * * * * *

(d) The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency. [Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not—

[(1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or

[(2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.]

Such employee may not be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.

* * * * * * *

§ 556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision.

(a) * * *

* * * * * * *

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. *The agency may, to the extent consistent with the interests of justice and the policy of the underlying statutes administered by the agency, consider a violation of section 557(d) of this title sufficient grounds for a decision adverse to a party who has knowingly committed such violation or knowingly caused such violation to occur.* A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

§ 557. Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record.

(a) * * *

* * * * * * *

(d) In any agency proceeding which is subject to subsection (a) of this section, except to the extent required for the disposition of ex parte matters as authorized by law—

(1) no interested person outside the agency shall make or knowingly cause to be made to any member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, an ex parte communication relevant to the merits of the proceeding;

(2) no member of the body comprising an agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, shall make or knowingly cause to be made to an interested person outside the agency an ex parte communication relevant to the merits of the proceeding;

(3) a member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of such proceeding who receives, or who makes, a communication in violation of this subsection, shall place on the public record of the proceeding:

(A) written communications transmitted in violation of this subsection;

(B) memorandums stating the substance of all oral communications occurring in violation of this subsection; and

(C) responses to the materials described in subparagraphs (A) and (B) of this subsection;

(4) upon receipt of a communication knowingly made by a party, or which was knowingly caused to be made by a party in violation of this subsection; the agency, administrative law judge, or other employee presiding at the hearing many, to the extent consistent with the interests of justice and the policy of the underlying statutes, require the person or party to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected by virtue of such violation;

(5) the prohibitions of this subsection shall apply at such time as the agency may designate, but in no case shall they apply later than the time at which a proceeding is noticed for hearing unless the person responsible for the communication has knowledge that it will be noticed, in which case the prohibitions shall apply at the time of his acquisition of such knowledge.

Standing Rules for Conducting Business in the Senate of the United States

* * * * * * *

Rule XXV

STANDING COMMITTEES

* * * * * * *

7(a) * * *

[(b) Meetings for the transaction of business of each standing committee of the Senate, other than for the conduct of hearings (which are provided for in section 112(a) of the Legislative Reorganization Act of 1970), shall be open to the public except during closed sessions for marketing up bills or for voting or when the committee by majority vote orders a closed session: *Provided*, That any such closed session may be open to the public if the committee by rule or by majority vote so determines.]

RULES OF THE HOUSE OF REPRESENTATIVES

First Session, Ninety-Fourth Congress

* * * * * * *

Rule XI

RULES OF PROCEDURE FOR COMMITTEES

* * * * * * *

Committee Rules

2. (a) * * *

* * * * * * *

Open Meetings and Hearings

[(g)(1) Each meeting for the transaction of business, including the markup of legislation, of each standing committee or subcommittee thereof shall be open to the public except when the committee or subcommittee, in open session and with a quorum present, determines by rollcall vote that all or part of the remainder of the meeting on that day shall be closed to the public. *Provided, however*, That no person other than members of the committee and such congressional staff and such departmental representatives as they may authorize shall be present at any business or markup session which has been closed to the public. This paragraph does not apply to open committee hearings which are provided for by clause 4(a)(3) of Rule X or by subparagraph (2) of this paragraph, or to any meeting that relates solely to internal budget or personnel matters.]

(g)(1) Each meeting of a standing, select, or special committee or subcommittee, shall be open to the public, except that a portion or portions of any such meeting may be closed to the public if the committee or subcommittee, as the case may be, determines by record vote of a majority of the members of the committee or subcommittee present that the matters to be discussed at such portion or portions—

(A) will disclose matters necessary to be kept secret in the interests of national defense or the foreign policy of the United States;

(B) will relate solely to matters of committee staff personnel or internal staff management or procedure;

(C) will tend to charge an individual with crime or misconduct, to disgrace or injure the professional standing of an individual, or otherwise to expose an individual to public contempt or obloquy, or will represent a clearly unwarranted invasion of the privacy of an individual;

(D) will disclose the identity of any informer or law enforcement agent or will disclose any information relating to the investigation or prosecution of any violation of law that is required to be kept secret in the interests of effective law enforcement; or

(E) will disclose information relating to the trade secrets or financial or commercial information pertaining specifically to a given person if—

(i) an Act of Congress requires the information to be kept confidential by Government officers and employees; or

(ii) the information has been obtained by the Government on a confidential basis, and is required to be kept secret in order to prevent undue injury to the competitive position of such person.

This clause shall not apply to meetings to conduct hearings.

APPENDIX

SUMMARY OF STATE OPEN MEETINGS LAWS[1]

	Date of latest action	Includes statement of public policy	Provides for open legislature	Provides for open legislative committees	Opens state agencies
Alabama	1915				yes
Alaska	1972	yes	yes	yes	yes
Arizona	1974	yes	yes	yes	yes
Arkansas	1967	yes			yes
California	1974	yes			yes
Colorado	1974	yes	yes	yes	yes
Connecticut	1971				yes
Delaware	1955				yes
Florida	1967				yes
Georgia	1972		yes	yes	yes
Hawaii	1959				yes
Idaho	1961				yes
Illinois	1973	yes			yes
Indiana	1971	yes			yes
Iowa	1967				yes
Kansas	1972	yes	yes	yes	yes
Kentucky	1974	yes	yes	yes	yes
Louisiana	1972				yes
Maine	1973	yes	yes	yes	yes
Maryland	1954				yes
Massachusetts	1970				yes
Michigan	1968		yes	yes	yes
Minnesota	1973		yes	yes	yes
Mississippi	1975				
Missouri	1973		yes	yes	yes
Montana	1963	yes	yes	yes	yes
Nebraska	1972	yes			yes
Nevada	1960	yes			yes
New Hampshire	1973		yes	yes	yes
New Jersey	1974	yes		yes	yes
New Mexico	1974			yes	yes
New York	no law				
North Carolina	1971	yes	yes	yes	yes
North Dakota	1957				yes
Ohio	1961		yes		yes
Oklahoma	1959				yes
Oregon	1973	yes	yes	yes	yes
Pennsylvania	1959				yes
Rhode Island	1974				yes
South Carolina	1972	yes	yes	yes	yes
South Dakota	1965		yes	yes	yes
Tennessee	1974	yes	yes	yes	yes
Texas	1973		yes	yes	yes
Utah	1953	yes	yes	yes	yes
Vermont	1973	yes	yes	yes	yes
Virginia	1974				yes
Washington	1973	yes			yes
West Virginia	1975				
Wisconsin	1959		yes	yes	yes
Wyoming	1973	yes			yes

[1] Compiled by Dr. John B. Adams for the Freedom of Information Foundation, Columbia, Missouri

Opens county & local agencies	Opens county boards	Opens city councils	Forbids closed exec. sessions	Legal recourse to halt secrecy	Actions in meetings in violation void	Provides penalties for violations	2 "Score"
yes	yes	yes				yes	5
yes	yes	yes			yes		8
yes	yes	yes		yes	yes	yes	10
yes	yes	yes		yes	yes	yes	8
yes	yes	yes		yes		yes	7
yes	yes	yes	yes	yes	yes		10
yes	yes	yes					4
yes	yes	yes					4
yes	yes	yes	yes	yes	yes	yes	8
yes	yes	yes		yes	yes	yes	9
yes	yes	yes					4
yes	yes	yes					4
yes	yes	yes		yes		yes	7
yes						yes	4
yes	yes	yes		yes		yes	6
yes	yes	yes			yes	yes	9
yes	yes	yes		yes	yes	yes	10
yes	yes	yes				yes	5
yes	yes	yes		yes		yes	9
							1
yes	yes	yes		yes			5
yes	yes	yes		yes			7
yes	yes	yes	yes	yes		yes	9
							unscored
yes	yes	yes		yes			7
yes	yes	yes					7
yes	yes	yes			yes	yes	7
yes	yes	yes				yes	6
yes	yes	yes				yes	7
	yes	yes			yes		6
yes	yes	yes		yes	yes	yes	8
							no law
yes	yes	yes		yes			8
yes	yes	yes	yes				5
yes	yes	yes					5
yes	yes	yes			yes	yes	6
yes	yes	yes		yes			8
yes	yes	yes				yes	5
							1
yes	yes	yes		yes			8
yes	yes	yes					6
yes	yes	yes	yes	yes	yes	yes	11
yes	yes	yes				yes	7
yes	yes	yes				yes	7
yes	yes	yes				yes	8
yes	yes	yes		yes			5
yes	yes	yes		yes		yes	7
							unscored
yes	yes	yes				yes	7
yes	yes	yes			yes		6

2 "Score" means the total number of "yes" answers. It provides a rough index of the law's comprehensiveness.

State Open Meetings Statutes

Alabama—Title 14, Ch. 70 § 393 (1915)
Alaska—§ 44.62.310 (1972)
Arizona—§ 38–431 (1974)
Arkansas—§ 12–2801 (1967)
California—§ 11120 Gov. Code (1974)
Colorado—3–33–1 (1974)
Connecticut—§1–21 (1971)
Delaware—29 § 5109 (1955)
Florida—§ 286.011 (1967)
Georgia—§ 40–3301 (1972)
Hawaii—§ 92–1 (1959)
Idaho—§ 59–1024 (1961)
Illinois—Ch. 102, § 41 (1973)
Indiana—§ 57–601 (1971)
Iowa—Ch. 28A (1967)
Kansas—§ 75–4317 (1972)
Kentucky—HB 100–1974 session
Louisiana—Title 42 § 6 (1972)
Maine—Title 1, Ch. 13, § 401 (1973)
Maryland—Art. 41, § 14 (1954)
Massachusetts—Ch. 30A, § 11a (1970)
Michigan—4.1800 (1968)
Minnesota—471.705 (1973)
Mississippi—(1975 Law)
Missouri—610.010 (1973)
Montana—Art. II of 1972 const. 82–3402 (1963)
Nebraska—84–1401 (1972)
Nevada—241.010 (1960)
New Hampshire—Title VI, Ch. 91–A (1973)
New Jersey—10: 4–1 (1974)
New Mexico—Ch. 91 of 1974 session
New York—(No Law)
North Carolina—143–318.1 (1971)
North Dakota—44–04–19 (1957)
Ohio—121.22 (1961)
Oklahoma—25 § 201 (1959)
Oregon—Ch. 172 of 1973 session
Pennsylvania—(1974 Law)
Rhode Island—(1974)
South Carolina—Article 2.2, § 1–20 (1972)
South Dakota—1–25–1 (1965)
Tennessee—Ch. No. 442 of 1974 session
Texas—17 § 6252 (1973)
Utah—52–4–1 (1953)
Vermont—1 U.S.A. 312 (1973)
Virginia—2.1–340 (1974)
Washington—42.30.010 (1973)
West Virginia—(1975 Law)
Wisconsin—SB 462 of 1974 session
Wyoming—9–692.10 (1973)

TEXT OF S. 5 AS REPORTED

A BILL TO PROVIDE THAT MEETINGS OF GOVERNMENT AGENCIES AND OF CONGRESSIONAL COMMITTEES SHALL BE OPEN TO THE PUBLIC, AND FOR OTHER PURPOSES

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.—This Act may be cited as the "Government in the Sunshine Act."

SEC. 2. DECLARATION OF POLICY.—It is hereby declared to be the policy of the United States that the public is entitled to the fullest practicable information regarding the decisionmaking processes of the Federal Government. It is the purpose of this Act to provide the public with such information, while protecting the rights of individuals and the ability of the Government to carry out its responsibilities.

SEC. 3. DEFINITIONS.—For purposes of this Act the term, "person" includes an individual, partnership, corporation, association, or public or private organization other than an agency.

TITLE I—CONGRESSIONAL PROCEDURES

SEC. 101. SENATE COMMITTEE MEETINGS.—(a) The Legislative Reorganization Act of 1946 is amended—

(1) by striking out the first sentence of section 133(b);

(2) by adding after section 133B the following:

"OPEN SENATE COMMITTEE MEETINGS

"SEC. 133C. Each meeting of a standing, select, or special committee of the Senate, or any subcommittee thereof, shall be open to the public, except that a portion or portions of any such meeting may be closed to the public if the committee or subcommittee, as the case may be, determines by record vote of a majority of the members of the committee or subcommittee present that the matters to be discussed at such portion or portions—

"(1) will disclose matters necessary to be kept secret in the interests of national defense or the foreign policy of the United States;

"(2) will relate solely to matters of committee staff personnel or internal staff management or procedure;

"(3) will tend to charge an individual with crime or misconduct, to disgrace or injure the professional standing of an individual, or otherwise to expose an individual to public contempt or obloquy, or will represent a clearly unwarranted invasion of the privacy of an individual;

"(4) will disclose the identity of any informer or law enforcement agent or will disclose any information relating to the investigation or prosecution of any violation of law that is required to be kept secret in the interests of effective law enforcement; or

"(5) will disclose information relating to the trade secrets of financial or commercial information pertaining specifically to a given person if—

"(A) an Act of Congress requires the information to be kept confidential by Government officers and employees; or

"(B) the information has been obtained by the Government on a confidential basis, and is required to be kept secret in order to prevent undue injury to the competitive position of such person.

This section shall not apply to meetings to conduct hearings.".

(b) Paragraph 7(b) of Rule XXV of the Standing Rules of the Senate is repealed.

(c) Title I of the table of contents of the Legislative Reorganization Act of 1946 is amended by inserting immediately below item 133B the following:

"133C. Open Senate committee meetings.".

SEC. 102. House of Representatives committee meetings.—Clause 2 (g)(1) of Rule XI of the Rules of the House of Representatives is amended to read as follows:

"(g)(1) Each meeting of a standing, select, or special committee or subcommittee, shall be open to the public, except that a portion or portions of any such meeting may be closed to the public if the committee or subcommittee, as the case may be, determines by record vote of a majority of the members of the committee or subcommittee present that the matters to be discussed at such portion or portions—

"(A) will disclose matters necessary to be kept secret in the interests of national defense or the foreign policy of the United States;

"(B) will relate solely to matters of committee staff personnel or internal staff management or procedure;

"(C) will tend to charge an individual with crime or misconduct, to disgrace or injure the professional standing of an individual, or otherwise to expose an individual to public contempt or obloquy, or will represent a clearly unwarranted invasion of the privacy of an individual;

"(D) will disclose the identity of any informer or law enforcement agent or will disclose any information relating to the investigation or prosecution of any violation of law that is required to be kept secret in the interests of effective law enforcement; or

"(E) will disclose information relating to the trade secrets or financial or commercial information pertaining specifically to a given person if—

"(i) an Act of Congress requires the information to be kept confidential by Government officers and employees; or

"(ii) the information has been obtained by the Government on a confidential basis, and is required to be kept secret in order to prevent undue injury to the competitive position of such person.

This clause shall not apply to meetings to conduct hearings.".

SEC. 103. (a) CONFERENCE COMMITTEES.—The Legislative Reorganization Act of 1946 is amended by inserting after section 133C, as added by section 101(a) of this Act, the following new section:

"OPEN CONFERENCE COMMITTEE MEETINGS

"SEC. 133D. Each conference committee between the Senate and the House of Representatives shall be open to the public except when the managers of either the Senate or the House of Representatives in open session determine, by a rollcall vote of a majority of those managers present, that all or part of the remainder of the meeting on the day of the vote shall be closed to the public.".

(b) Title I of the table of contents of the Legislative Reorganization Act of 1946 is amended by inserting immediately below item 133C, as added by section 101(c) of this Act, the following:

"133D. Open conference committee meetings.".

SEC. 104. (a) JOINT COMMITTEES.—The Legislative Reorganization Act of 1946 is amended by inserting after section 133D, as added by section 102(a) of this Act, the following new section:

"OPEN JOINT COMMITTEE MEETINGS

"SEC. 133E. Each meeting of a joint committee of the Senate and House of Representatives, or any subcommittee thereof, shall be open to the public, except that a portion or portions of any such meeting may be closed to the public if the committee or subcommittee, as the case may be, determines by record vote of a majority of the members of the committee or subcommittee present that the matters to be discussed or the testimony to be taken at such portion or portions—

"(1) will disclose matters necessary to be kept secret in the interests of national defense or the foreign policy of the United States;

"(2) will relate solely to matters of committee staff personnel or internal staff management or procedure;

"(3) will tend to charge an individual with crime or misconduct, to disgrace or injure the professional standing of an individual, or otherwise to expose an individual to public contempt or obloquy, or will represent a clearly unwarranted invasion of the privacy of an individual;

"(4) will disclose the identity of any informer or law enforcement agent or will disclose any information relating to the investigation or prosecution of any violation of law that is required to be kept secret in the interests of effective law enforcement; or

"(5) will disclose information relating to the trade secrets or financial or commercial information pertaining specifically to a given person if—

"(A) an Act of Congress requires the information to be kept confidential by Government officers and employees; or

"(B) the information has been obtained by the Government on a confidential basis, and is required to be kept secret in order to prevent undue injury to the competitive position of such person.

This section shall not apply to meetings to conduct hearings.".

(b) Titile I of the table of contents of the Legislative Reorganization Act of 1946 is amended by inserting immediately below item 133D, as added by section 103(b) of this Act, the following:

"133E. Open joint committee meetings.".

80-459 O - 77 - 17

SEC. 105. EXERCISE OF RULEMAKING POWERS.—The provisions of this title are enacted by the Congress—

(1) as an exercise of the rulemaking power of the Senate and the House of Representatives, respectively, and as such they shall be considered as part of the rules of each House, respectively, or of that House to which they specifically apply, and such rules shall supersede other rules only to the extent that they are inconsistent therewith; and

(2) with full recognition of the constitutional right of either House to change such rules (so far as relating to such House) at any time, in the same manner, and to the same extent as in the case of any other rule of such House.

TITLE II—AGENCY PROCEDURES

SEC. 201. (a) This section applies, according to the provisions thereof, to the Federal Election Commission and to any agency, as defined in section 551(1) of title 5, United States Code, where the collegial body comprising the agency consists of two or more individual members, at least a majority of whom are appointed to such position by the President with the advice and consent of the Senate. Except as provided in subsection (b), all meetings of such collegial body, or of a subdivision thereof authorized to take action on behalf of the agency, shall be open to the public. For purposes of this section, a meeting means the deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations concern the joint conduct or disposition of official agency business.

(b) Except where the agency finds that the public interest requires otherwise, (1) subsection (a) shall not apply to any agency meeting, or any portion of an agency meeting, or to any meeting, or any portion of a meeting, of a subdivision thereof authorized to take action on behalf of the agency, and, (2) the requirements of subsections (c) and (d) shall not apply to any information pertaining to such meeting otherwise required by this section to be disclosed to the public, where the agency, or the subdivision thereof conducting the meeting, properly determines that such portion or portions of its meeting, or such information, can be reasonably expected to—

(1) disclose matters (A) specifically authorized under criteria established by an Executive order to be kept secret in the interests of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) relate solely to the agency's own internal personnel rules and practices;

(3) disclose information of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy;

(4) involve accusing any person of a crime, or formally censuring any person;

(5) disclose information contained in investigatory records compiled for law enforcement purposes, but only to the extent that the disclosure would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial ajudication, (C) constitute an unwarranted invasion of personal

privacy, (D) disclose the identity of a confidential source, (E) in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, disclose confidential information furnished only by the confidential source, (F) disclose investigative techniques and procedures, or (G) endanger the life or physical safety of law enforcement personnel;

(6) disclose trade secrets, or financial or commercial information obtained from any person, where such trade secrets or other information could not be obtained by the agency without a pledge of confidentiality, or where such information must be withheld from the public in order to prevent substantial injury to the competitive position of the person to whom such information relates;

(7) disclose information which must be withheld from the public in order to avoid premature disclosure of an action or a proposed action by—

(A) an agency which regulates currencies, securities, commodities, or financial institutions where such disclosure would (i) lead to serious financial speculation in currencies, securities, or commodities, or (ii) seriously endanger the stability of any financial institution;

(B) any agency where such disclosure would seriously frustrate implementation of the proposed agency action, or private action contingent thereon; or

(C) any agency relating to the purchase by such agency of real property.

This paragraph shall not apply in any instance where the agency has already disclosed to the public the content or nature of its proposed action, or where the agency is required by law to make such disclosure on its own initiative prior to taking final agency action on such proposal;

(8) disclose information contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions;

(9) specifically concern the agency's participation in a civil action in Federal or State court, or the initiation, conduct, or disposition by the agency of a particular case of formal agency adjudication pursuant to the procedures in section 554 of title 5, United States Code, or otherwise involving a determination on the record after opportunity for a hearing; or

(10) disclose information required to be withheld from the public by any other statute establishing particular criteria or referring to particular types of information.

(c)(1) Action under subsection (b) shall be taken only when a majority of the entire membership of the agency, or of the subdivision thereof authorized to conduct the meeting on behalf of the agency, votes to take such action. A separate vote of the agency members, or the members of a subdivision thereof, shall be taken with respect to each agency meeting a portion or portions of which are proposed to be closed to the public pursuant to subsection (b), or with respect to any information which is proposed to be withheld under subsection

(b). A single vote may be taken with respect to a series of meetings, a portion or portions of which are proposed to be closed to the public, or with respect to any information concerning such series of meetings, so long as each meeting in such series involves the same particular matters, and is scheduled to be held no more than thirty days after the initial meeting in such series. The vote of each agency member participating in such vote shall be recorded and no proxies shall be allowed. Whenever any person whose interests may be directly affected by a meeting requests that the agency close a portion or portions of the meeting to the public for any of the reasons referred to in paragraphs (3), (4), or (5) of subsection (b), the agency shall vote whether to close such meeting, upon request of any one of its members. Within one day of any vote taken pursuant to this paragraph the agency shall make publicly available a written copy of such vote.

(2) If a meeting or portion thereof is closed to the public, the agency shall, within one day of the vote taken pursuant to paragraph (1) of this subsection, make publicly available a full written explanation of its action closing the meeting, or portion thereof, together with a list of all persons expected to attend the meeting, and their affiliation.

(3) Any agency, a majority of whose meetings will properly be closed to the public, in whole or in part, pursuant to paragraphs (6), (7)(A), (8), or (9) of subsection (b), or any combination thereof, may provide by regulation for the closing of such meetings, or portions of such meetings, so long as a majority of the members of the agency, or of the subdivision thereof conducting the meeting, votes at the beginning of such meeting, or portion thereof, to close the meeting, and a copy of such vote is made available to the public. The provisions of this subsection, and subsection (d), shall not apply to any meeting to which such regulations apply: Provided, That the agency shall, except to the extent that the provision of subsection (b) may apply, provide the public with public announcement of the date, place, and subject matter of the meeting at the earliest practicable opportunity.

(d) In the case of each meeting, the agency shall make public announcement, at least one week before the meeting, of the date, place, and subject matter of the meeting, whether open or closed to the public, and the name and phone number of the official designated by the agency to respond to requests for information about the meeting. Such announcement shall be made unless a majority of the members of the agency, or of the members of the subdivision thereof conducting the meeting, determines by a vote that agency business requires that such meetings be called at an earlier date, in which case, the agency shall make public announcement of the date, place, and subject matter of such meeting, and whether open or closed to the public, at the earliest practicable opportunity. The subject matter of a meeting, or the determination of the agency to open or close a meeting, or portion of a meeting, to the public, may be changed following the public announcement required by this paragraph if, (1) a majority of the entire membership of the agency, or of the subdivision thereof conducting the meeting, determines by a vote that agency business so requires, and that no earlier announcement of the change was possible, and (2) the agency publicly announces such change at the earliest practicable opportunity. Immediately following the public announcement required by this par-

agraph, notice of such announcement shall also be submitted for publication in the Federal Register.

(e) A complete transcript or electronic recording adequate to fully record the proceedings shall be made of each meeting, or portion of a meeting, closed to the public, except for a meeting, or portion of a meeting, closed to the public pursuant to paragraph (9) of subsection (b). The agency shall make promptly available to the public, in a place easily accessible to the public, the complete transcript or electronic recording of the discussion at such meeting of any item on the agenda, or of the testimony of any witness received at such meeting, where no significant portion of such discussion or testimony contains any information specified in paragraphs (1) through (10) of subsection (b). Copies of such transcript, or a transcription of such electronic recording disclosing the identity of each speaker, shall be furnished to any person at the actual cost of duplication or transcription. The agency shall maintain a complete verbatim copy of the transcript, or a complete electronic recording of each meeting, or portion of a meeting, closed to the public, for a period of at least two years after such meeting, or until one year after the conclusion of any agency proceeding with respect to which the meeting, or a portion thereof, was held, whichever occurs later.

(f) Each agency subject to the requirements of this section shall, within one hundred and eighty days after the enactment of this Act, following consultation with the Office of the Chairman of the Administrative Conference of the United States and published notice in the Federal Register of at least thirty days and opportunity for written comment by any persons, promulgate regulations to implement the requirements of subsections (a) through (e) of this section. Any person may bring a proceeding in the United States District Court for the District of Columbia to require an agency to promulgate such regulations if such agency has not promulgated such regulations within the time period specified herein. Any person may bring a proceeding in the United States Court of Appeals for the District of Columbia to set aside agency regulations issued pursuant to this subsection that are not in accord with the requirements of subsections (a) through (e) of this section, and to require the promulgation of regulations that are in accord with such subsections.

(g) The district courts of the United States have jurisdiction to enforce the requirement of subsections (a) through (e) of this section by declaratory judgment, injunctive relief, or other relief as may be appropriate. Such actions may be brought by any person against an agency or its members prior to, or within sixty days after, the meeting out of which the violation of this section arises, except that if public announcement of such meeting is not initially provided by the agency in accordance with the requirements of this section, such action may be instituted pursuant to this section at any time prior to sixty days after any public announcement of such meeting. Before bringing such action, the plaintiff shall first notify the agency of his intent to do so, and allow the agency a reasonable period of time, not to exceed ten days, to correct any violation of this section, except that such reasonable period of time shall not be held to exceed two working days where notification of such violation is made prior to a meeting which the agency

has voted to close. Such actions may be brought in the district wherein the plaintiff resides, or has his principal place of business, or where the agency in question has its headquarters. In such actions a defendant shall serve his answer within twenty days after the service of the complaint. The burden is on the defendant to sustain his action. In deciding such cases the court may examine in camera any portion of a transcript or electronic recording of a meeting closed to the public, and may take such additional evidence as it deems necessary. The court, having due regard for orderly administration and the public interest, as well as the interests of the party, may grant such equitable relief as it deems appropriate, including granting an injunction against future violations of this section, or ordering the agency to make available to the public the transcript or electronic recording of any portion of a meeting improperly closed to the public. Except to the extent provided in subsection (h) of this section, nothing in this section confers jurisdiction on any district court to set aside or invalidate any agency action taken or discussed at an agency meeting out of which the violation of this section arose.

(h) Any Federal court otherwise authorized by law to review agency action may, at the application of any person properly participating in the proceeding pursuant to other applicable law, inquire into violations by the agency of the requirements of this section, and afford any such relief as it deems appropriate.

(i) The court may assess against any party reasonable attorney fees and other litigation costs reasonably incurred by any other party who substantially prevails in any action brought in accordance with the provisions of subsection (f), (g), or (h) of this section. Costs may be assessed against an individual member of an agency only in the case where the court finds such agency member has intentially and repeatedly violated this section, or against the plaintiff where the court finds that the suit was initiated by the plaintiff for frivolous or dilatory purposes. In the case of apportionment of costs against an agency, the costs may be assessed by the court against the United States.

(j) The agencies subject to the requirements of this section shall annually report to Congress regarding their compliance with such requirements, including a tabulation of the total number of agency meetings open to the public, the total number of meetings closed to the public, the reasons for closing such meetings, and a description of any litigation brought against the agency under this section.

SEC. 202. (a) Section 557 of title 5, United States Code, is amended by adding at the end thereof the following new subsection:

"(d) In any agency proceeding which is subject to subsection (a) of this section, except to the extent required for the disposition of ex parte matters as authorized by law—

"(1) no interested person outside the agency shall make or knowingly cause to be made to any member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, an ex parte communication relevant to the merits of the proceeding;

"(2) no member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably

be expected to be involved in the decisional process of the proceeding, shall make or knowingly cause to be made to an interested person outside the agency an ex parte communication relevant to the merits of the proceeding;

"(3) a member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of such proceeding who receives, or who makes, a communication in violation of this subsection, shall place on the public record of the proceeding:

"(A) written communications transmitted in violation of this subsection;

"(B) memorandums stating the substance of all oral communications occurring in violation of this subsection; and

"(C) responses to the materials described in subparagraphs (A) and (B) of this subsection;

"(4) upon receipt of a communication knowingly made by a party, or which was knowingly caused to be made by a party in violation of this subsection; the agency, administrative law judge, or other employee presiding at the hearing may, to the extent consistent with the interests of justice and the policy of the underlying statutes, require the person or party to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected by virtue of such violation;

"(5) the prohibitions of this subsection shall apply at such time as the agency may designate, but in no case shall they apply later than the time at which a proceeding is noticed for hearing unless the person responsible for the communication has knowledge that it will be noticed, in which case the prohibitions shall apply at the time of his acquisition of such knowledge.".

(b) The second sentence of section 554(d) of title 5, United States Code, is amended to read as follows: "Such employee may not be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.".

(c) Section 551 of title 5, United States Code, is amended—

(1) by striking out "and" at the end of paragraph (12);

(2) by striking out the "act." at the end of paragraph (13) and inserting in lieu thereof "act; and"

(3) by adding at the end thereof the following new paragraph:

"(14) 'ex parte communication' means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given.".

(d) Section 556(d) of title 5, United States Code, is amended by inserting between the third and fourth sentences thereof the following new sentence: "The agency may, to the extent consistent with the interests of justice and the policy of the underlying statutes administered by the agency, consider a violation of section 557(d) of this title sufficient grounds for a decision adverse to a party who has knowingly committed such violation or knowingly caused such violation to occur.".

Sec. 203. (a) Except as specifically provided by section 201, nothing in section 201 confers any additional rights on any person, or limits

the present rights of any such person, to inspect or copy, under section 552 of title 5, United States Code, any documents or other written material within the possession of any agency. In the case of any request made pursuant to section 552 of title 5, United States Code, to copy or inspect the transcripts or electronic recordings described in section 201(e), the provisions of this Act shall govern whether such transcript or electronic recordings shall be made available in accordance with such request. The requirements of chapter 33, of title 44, United States Code, shall not apply to the transcripts and electronic recordings described in section 201(e). This title does not authorize any information to be withheld from Congress.

(b) Nothing in section 201 authorizes any agency to withhold from any individual any record, including transcripts or electronic recordings required by this Act, which is otherwise accessible to that individual under section 552a of title 5, United States Code.

SEC. 204. The provisions of this title shall become effective one hundred and eighty days after the date on which this Act is enacted, except that the provisions of section 201 requiring the issuance of regulations to implement such section shall become effective upon enactment.

94TH CONGRESS
1ST SESSION

S. 5 Calendar No. 343

[Report No. 94–354]

[Report No. 94–381] *

IN THE SENATE OF THE UNITED STATES

JANUARY 15, 1975

Mr. CHILES (for himself, Mr. ABOUREZK, Mr. BAYH, Mr. BEALL, Mr. BIDEN, Mr. BROCK, Mr. BROOKE, Mr. CASE, Mr. CHURCH, Mr. CLARK, Mr. CRANSTON, Mr. GRAVEL, Mr. GARY W. HART, Mr. PHILIP A. HART, Mr. HASKELL, Mr. HATFIELD, Mr. HATHAWAY, Mr. HELMS, Mr. HOLLINGS, Mr. HUMPHREY, Mr. JACKSON, Mr. LEAHY, Mr. MCGOVERN, Mr. MANSFIELD, Mr. MATHIAS, Mr. METCALF, Mr. MONDALE, Mr. MUSKIE, Mr. NELSON, Mr. NUNN, Mr. PACKWOOD, Mr. PERCY, Mr. PROXMIRE, Mr. RIBICOFF, Mr. ROTH, Mr. STAFFORD, Mr. STONE, Mr. SYMINGTON, Mr. TUNNEY, and Mr. WEICKER) introduced the following bill; which was read twice and referred to the Committee on Government Operations

JULY 31, 1975

Reported by Mr. CHILES, with an amendment

[Strike out all after the enacting clause and insert the part printed in italic]

AUGUST 1, 1975

Referred jointly to the Committees on Rules and Administration and the Judiciary with instructions to report back not later than September 19, 1975

SEPTEMBER 18 (legislative day, SEPTEMBER 11), 1975

Reported by Mr. CANNON, from the Committee on Rules and Administration, with an additional amendment

[Omit the part in linetype italics]

A BILL

To provide that meetings of Government agencies and of congressional committees shall be open to the public, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 ~~SECTION 1. SHORT TITLE.—This Act may be cited as~~
4 ~~the "Government in the Sunshine Act".~~

II—O

* The amendment of the Committee on Rules and Administration is on p. 37, beginning with line 8.

1 ~~SEC. 2. DECLARATION OF POLICY. It is hereby de-~~
2 ~~clared to be the policy of the United States that the public~~
3 ~~is entitled to the fullest practicable information regarding~~
4 ~~the decisionmaking processes of the Federal Government.~~
5 ~~SEC. 3. DEFINITIONS. For purposes of this Act—~~
6 ~~(1) "National defense" means—~~
7 ~~(A) the protection of the United States and its~~
8 ~~military forces against actual or potential military~~
9 ~~attack by a foreign power;~~
10 ~~(B) the obtaining of foreign intelligence informa-~~
11 ~~tion deemed essential to the military defense of the~~
12 ~~United States or its forces;~~
13 ~~(C) the protection of information essential to the~~
14 ~~military defense of the United States or its forces against~~
15 ~~foreign intelligence activities; or~~
16 ~~(D) the protection, to the extent specifically found~~
17 ~~necessary by the President in writing, of the United~~
18 ~~States against overthrow of the Government by force;~~
19 ~~and~~
20 ~~(2) "Person" includes an individual, partnership, cor-~~
21 ~~poration, associated governmental authority, or public or~~
22 ~~private organization.~~
23 ~~TITLE I—CONGRESSIONAL PROCEDURES~~
24 ~~SEC. 101. SENATE COMMITTEE HEARING PRO-~~
25 ~~CEDURE. (a) The Legislative Reorganization Act of 1946~~
26 ~~is amended—~~

~~(1) by striking out the third sentence of section 133(b);~~

~~(2) by striking out subsections (a), (b), and (f) of section 133A~~;

~~(3) by adding after section 133B the following~~:

"~~OPEN SENATE COMMITTEE MEETINGS~~

"~~SEC. 133C. (a) Each meeting of each standing, select, or special committee of the Senate, or subcommittee thereof, including meetings to conduct hearings, shall be open to the public: *Provided*, That a portion or portions of such meetings may be closed to the public if the committee or subcommittee, as the case may be, determines by a vote of a majority of a quorum of the committee or subcommittee present that the matters to be discussed or the testimony to be taken at such portion or portions~~

"~~(1) will disclose matters necessary to be kept secret in the interests of national defense or the necessarily confidential conduct of the foreign policy of the United States~~;

"~~(2) will relate solely to matters of committee staff personnel or internal staff management or administration;~~

"~~(3) will tend to charge with crime or misconduct, or to disgrace any person, or will represent a clearly unwarranted invasion of the privacy of any individual~~: ~~*Provided*, That this paragraph shall not apply to any~~

1 ~~Government officer or employee with respect to his of-~~
2 ~~ficial duties or employment: *And provided further*, That~~
3 ~~as applied to a witness at a meeting, this paragraph~~
4 ~~shall not apply unless the witness requests in writing that~~
5 ~~the hearing be closed to the public;~~
6 ~~"(4) will disclose information pertaining to any in-~~
7 ~~vestigation conducted for law enforcement purposes, but~~
8 ~~only to the extent that the disclosure would (A) inter-~~
9 ~~fere with enforcement proceedings, (B) deprive a per-~~
10 ~~son of a right to a fair trial or an impartial adjudication~~,
11 ~~(C) disclose the identity of a confidential source and~~,
12 ~~in the case of a record compiled by a criminal law en-~~
13 ~~forcement authority in the course of a criminal investi-~~
14 ~~gation, or by an agency conducting a lawful national~~
15 ~~security intelligence investigation, confidential informa-~~
16 ~~tion furnished only by the confidential source, (D) dis-~~
17 ~~close investigative techniques and procedures, or (E)~~
18 ~~endanger the life or physical safety of law enforcement~~
19 ~~personnel; or~~
20 ~~"(5) will disclose information relating to the trade~~
21 ~~secrets or financial or commercial information pertaining~~
22 ~~specifically to a given person where—~~
23 ~~"(A) a Federal statute requires the informa-~~
24 ~~tion to be kept confidential by Government officers~~
25 ~~and employees; or~~
26 ~~"(B) the information has been obtained by the~~

1 ~~Federal Government on a confidential basis other~~
2 ~~than through an application by such person for a~~
3 ~~specific Government financial or other benefit, and~~
4 ~~the information must be kept secret in order to pre-~~
5 ~~vent grave and irreparable injury to the competitive~~
6 ~~position of such person.~~
7 ~~A separate vote of the committee shall be taken with respect~~
8 ~~to each committee or subcommittee meeting a portion or por-~~
9 ~~tions of which are proposed to be closed to the public pur-~~
10 ~~suant to this subsection. The vote of each committee member~~
11 ~~participating in each such vote shall be recorded and no~~
12 ~~proxies shall be allowed. Within one day of such vote, the~~
13 ~~committee shall make publicly available a written copy of~~
14 ~~such vote and, if a meeting or portion thereof is closed to the~~
15 ~~public, a full written explanation of its action.~~
16 "~~(b) Each standing, select, or special committee of the~~
17 ~~Senate, or subcommittee thereof, shall make public announce-~~
18 ~~ment of the date, place, and subject matter of each meeting~~
19 ~~at least one week before such meeting unless the committee~~
20 ~~or subcommittee determines by a vote of a majority of a~~
21 ~~quorum of the committee or subcommittee present that com-~~
22 ~~mittee business requires that such meeting be called at an~~
23 ~~earlier date, in which case the committee shall make public~~
24 ~~announcement of the date, place, and subject matter of such~~
25 ~~meeting at the earliest practicable opportunity~~.
26 "~~(c) A complete transcript shall be made of each meet-~~

1 ~~ing of each standing, select, or special committee or subcom-~~
2 ~~mittee (whether open or closed to the public). Except as~~
3 ~~provided in subsection (d) of this section, a copy of each~~
4 ~~such transcript shall be made available for public inspection~~
5 ~~within seven days of each such meeting, and additional copies~~
6 ~~of any transcript shall be furnished to any person at the actual~~
7 ~~cost of duplication. Notwithstanding the provisions of sub-~~
8 ~~section (d), in the case of meetings closed to the public, the~~
9 ~~portion of such transcript made available for public inspection~~
10 ~~shall include a list of all persons attending and their affilia-~~
11 ~~tion, except for any portion of such list which would disclose~~
12 ~~the identity of a confidential source, or endanger the life~~
13 ~~or physical safety of law enforcement personnel.~~
14 "~~(d) In the case of meetings closed to the public pur-~~
15 ~~suant to subsection (a) of this section, the committee or sub-~~
16 ~~committee may delete from the copies of transcripts that are~~
17 ~~required to be made available or furnished to the public pur-~~
18 ~~suant to subsection (c) of this section, those portions which~~
19 ~~it determines by vote of the majority of a quorum of the~~
20 ~~committee or subcommittee consist of materials specified in~~
21 ~~paragraph (1), (2), (3), (4), or (5) of subsection (a)~~
22 ~~of this section. A separate vote of the committee or sub-~~
23 ~~committee shall be taken with respect to the transcript of~~
24 ~~each such meeting. The vote of each committee or subcom-~~
25 ~~mittee member participating in each such vote shall be~~
26 ~~recorded and published and no proxies shall be allowed. In~~

1 ~~place of each portion deleted from copies of the transcript~~
2 ~~made available to the public, the committee or subcommittee~~
3 ~~shall supply a full written explanation of why such portion~~
4 ~~was deleted, and a summary of the substance of the deleted~~
5 ~~portion that does not itself disclose information specified in~~
6 ~~paragraph (1), (2), (3), (4), or (5) of subsection (a).~~
7 ~~The committee or subcommittee shall maintain a complete~~
8 ~~copy of the transcript of each meeting (including those por-~~
9 ~~tions deleted from copies made available to the public), for~~
10 ~~a period of at least one year after such meeting, or until~~
11 ~~the Congress following the one in which such meeting was~~
12 ~~held is assembled, whichever occurs later.~~
13 ~~"(c) A point of order may be raised in the Senate~~
14 ~~against any committee or subcommittee vote to close a meet-~~
15 ~~ing to the public pursuant to subsection (a) of this section,~~
16 ~~or against any committee or subcommittee vote to delete~~
17 ~~from the publicly available copy a portion of a meeting tran-~~
18 ~~script pursuant to subsection (d) of this section, by com-~~
19 ~~mittee or subcommittee members comprising one-fourth or~~
20 ~~more of the total number of members of such committee or~~
21 ~~subcommittee present and voting for or against such action.~~
22 ~~Any such point of order shall be raised in the Senate within~~
23 ~~two calendar days after the vote against which the point~~
24 ~~of order is raised, and such point of order shall be a~~
25 ~~matter of highest personal privilege. Each such point of-~~

1 ~~order shall immediately be referred to a Select Committee~~
2 ~~on Meetings consisting of the President pro tempore, the~~
3 ~~leader of the majority party, and the leader of the minority~~
4 ~~party. The select committee shall examine the complete~~
5 ~~verbatim transcript of the meeting in question and shall rule~~
6 ~~whether the vote to close the meeting was in accordance~~
7 ~~with subsection (a) of this section, or whether the vote to~~
8 ~~delete a portion or portions from publicly available copies~~
9 ~~of the meeting transcript was in accordance with subsection~~
10 ~~(d) of this section, as the case may be. The select committee~~
11 ~~shall report to the Senate within five calendar days (ex-~~
12 ~~cluding days where the Senate is not in session) a resolu-~~
13 ~~tion containing its findings. If the Senate adopts a resolution~~
14 ~~finding that the committee vote in question was not in~~
15 ~~accordance with the relevant subsection, it shall direct that~~
16 ~~there be made publicly available the entire transcript of~~
17 ~~the meeting improperly closed to the public or the portion~~
18 ~~or portions of any meeting transcript improperly deleted~~
19 ~~from the publicly available copy, as the case may be.~~
20 ~~"(f) The Select Committee on Meetings shall not be~~
21 ~~subject to the provisions of subsection (a), (b), (c), or~~
22 ~~(d) of this section."~~
23 ~~(b) Subsection (a) of subsection 242 of the Legislative~~
24 ~~Reorganization Act of 1970 is repealed.~~

1 ~~(c) Paragraph 7(b) of Rule XXV of the Standing~~
2 ~~Rules of the Senate is repealed.~~
3 ~~(d) Title I of the table of contents of the Legislative~~
4 ~~Reorganization Act of 1946 is amended by inserting imme-~~
5 ~~diately below item 133B the following:~~
~~"133C. Open Senate committee meetings."~~.
6 ~~SEC. 102. Clause 27 (f) (2) of Rule XI of the Rules of~~
7 ~~the House of Representatives is amended to read as follows:~~
8 ~~"(2) (A) Each meeting of each standing, select, or~~
9 ~~special committee or subcommittee, including meetings to~~
10 ~~conduct hearings, shall be open to the public: *Provided*, That~~
11 ~~a portion or portions of such meetings may be closed to the~~
12 ~~public if the committee or subcommittee, as the case may be,~~
13 ~~determines by vote of a majority of a quorum of the com-~~
14 ~~mittee or subcommittee present that the matters to be dis-~~
15 ~~cussed or the testimony to be taken at such portion or~~
16 ~~portions—~~
17 ~~"(i) will disclose matters necessary to be kept~~
18 ~~secret in the interests of national defense or the neces-~~
19 ~~sarily confidential conduct of the foreign policy of the~~
20 ~~United States;~~
21 ~~"(ii) will relate solely to matters of committee staff~~
22 ~~personnel or internal staff management or administra-~~
23 ~~tion;~~

1 ~~"(iii) will tend to charge with crime or misconduct,~~
2 ~~or to disgrace any person, or will represent a clearly~~
3 ~~unwarranted invasion of the privacy of any individual:~~
4 ~~*Provided*, That this paragraph shall not apply to any~~
5 ~~Government officer or employee with respect to his offi-~~
6 ~~cial duties or employment: *And provided further*, That~~
7 ~~as applied to a witness at a meeting, this paragraph shall~~
8 ~~not apply unless the witness requests in writing that the~~
9 ~~hearing be closed to the public;~~
10 ~~"(iv) will disclose information pertaining to any~~
11 ~~investigation conducted for law enforcement purposes,~~
12 ~~but only to the extent that the disclosure would (A)~~
13 ~~interfere with enforcement proceedings, (B) deprive~~
14 ~~a person of a right to a fair trial or an impartial adjudica-~~
15 ~~tion, (C) disclose the identity of a confidential source~~
16 ~~and, in the case of a record compiled by a criminal law~~
17 ~~enforcement authority in the course of a criminal investi-~~
18 ~~gation, or by an agency conducting a lawful national~~
19 ~~security intelligence investigation, confidential informa-~~
20 ~~tion furnished only by the confidential source, (D) dis-~~
21 ~~close investigative techniques and procedures, or (E)~~
22 ~~endanger the life or physical safety of law enforcement~~
23 ~~personnel; or~~
24 ~~"(v) will disclose information relating to the trade-~~

1 ~~secrets or financial or commercial information pertain-~~
2 ~~ing specifically to a given person where—~~
3 ~~"(I) a Federal statute requires the information~~
4 ~~to be kept confidential by Government officers and~~
5 ~~employees; or~~
6 ~~"(II) the information has been obtained by the~~
7 ~~Federal Government on a confidential basis other~~
8 ~~than through an application by such person for a~~
9 ~~specific Government financial or other benefit, and~~
10 ~~the information must be kept secret in order to~~
11 ~~prevent grave and irreparable injury to the competi-~~
12 ~~tive position of such person.~~
13 ~~A separate vote of the committee shall be taken with respect~~
14 ~~to each committee or subcommittee meeting a portion or por-~~
15 ~~tions of which are proposed to be closed to the public pur-~~
16 ~~suant to this subsection. The vote of each committee member~~
17 ~~participating in each such vote shall be recorded and no~~
18 ~~proxies shall be allowed. Within one day of such vote, the~~
19 ~~committee shall make publicly available a written copy of~~
20 ~~such vote and, if a meeting or portion thereof is closed to~~
21 ~~the public, a full written explanation of its action.~~
22 ~~"(B) Each standing, select, or special committee or~~
23 ~~subcommittee shall make public announcement of the date,~~
24 ~~place, and subject matter of each meeting at least one week~~

~~before such meeting unless the committee or subcommittee determines by a vote of a majority of a quorum of the committee or subcommittee present that committee business requires that such meeting be called at an earlier date, in which case the committee shall make public announcement of the date, place, and subject matter of such meeting at the earliest practicable opportunity.~~

~~"(C) A complete transcript shall be made of each meeting of each standing, select, or special committee or subcommittee (whether open or closed to the public). Except as provided in paragraph (D), a copy of each such transcript shall be made available for public inspection within seven days of each such meeting, and additional copies of any transcript shall be furnished to any person at the actual cost of duplication. Notwithstanding the provisions of paragraph (D), in the case of meetings closed to the public, the portion of such transcript made available for public inspection shall include a list of all persons attending and their affiliation, except for any portion of such list which would disclose the identity of a confidential source, or endanger the life or physical safety of law enforcement personnel.~~

~~"(D) In the case of meetings closed to the public pursuant to subparagraph (A), the committee or subcommittee may delete from the copies of transcripts that are required to be made available or furnished to the public pursuant to subparagraph (C), portions which it determines by vote of~~

~~the majority of a quorum of the committee or subcommittee consist of material specified in subsection (i), (ii), (iii), (iv), or (v) of subparagraph (A). A separate vote of the committee or subcommittee shall be taken with respect to the transcript of such meeting. The vote of each committee or subcommittee member participating in each such vote shall be recorded and published, and no proxies shall be allowed. In place of each portion deleted from copies of the transcript made available to the public, the committee or subcommittee shall supply a full written explanation of why such portion was deleted and a summary of the substance of the deleted portion that does not itself disclose information specified in subsection (i), (ii), (iii), (iv), or (v) of subparagraph (A). The committee or subcommittee shall maintain a complete copy of the transcript of each meeting (including those portions deleted from copies made available to the public), for a period of at least one year after such meeting, or until the Congress following the one in which such meeting was held is assembled, whichever occurs later.~~

~~"(E) A point of order may be raised against any committee or subcommittee vote to close a meeting to the public pursuant to subparagraph (A), or against any committee or subcommittee vote to delete from the publicly available copy a portion of a meeting transcript pursuant to subparagraph (D), by committee or subcommittee members comprising~~

1 ~~one-fourth or more of the total number of the members of~~
2 ~~such committee or subcommittee present and voting for or~~
3 ~~against such action. Any such point of order must be raised~~
4 ~~before the entire House within two calendar days after the~~
5 ~~vote against which the point of order is raised, and such point~~
6 ~~of order shall be a matter of highest personal privilege. Each~~
7 ~~such point of order shall immediately be referred to a Select~~
8 ~~Committee on Meetings consisting of the Speaker of the~~
9 ~~House of Representatives, the majority leader, and the mi-~~
10 ~~nority leader. The select committee shall report to the House~~
11 ~~within five calendar days (excluding days where the House~~
12 ~~is not in session) a resolution containing its findings. If the~~
13 ~~House adopts a resolution finding that the committee vote in~~
14 ~~question was not in accordance with the relevant subsection,~~
15 ~~it shall direct that there be made publicly available the entire~~
16 ~~transcript of the meeting improperly closed to the public or~~
17 ~~the portion or portions of any meeting transcript improperly~~
18 ~~deleted from the publicly available copy~~.

19 "~~(F) The Select Committee on Meetings shall not be~~
20 ~~subject to the provisions of subparagraph (A), (B), (C),~~
21 ~~or (D) of this section.~~"

22 ~~SEC. 103. (a) JOINT AND CONFERENCE COMMIT-~~
23 ~~TEES. The Legislative Reorganization Act of 1946 is~~
24 ~~amended by inserting after section 133C, as added by sec-~~
25 ~~tion 101(3) of this Act, the following new section:~~

1 ~~"OPEN JOINT AND CONFERENCE COMMITTEE MEETINGS~~

2 ~~"SEC. 133D. (a) Each meeting of each joint committee~~

3 ~~and each subcommittee thereof, and each committee of con-~~

4 ~~ference shall be open to the public: *Provided*, That a por-~~

5 ~~tion or portions of such meetings may be closed to the public~~

6 ~~if the committee determines by vote of a majority of a quo-~~

7 ~~rum of the committee or subcommittee present that the~~

8 ~~matters to be discussed or the testimony to be taken at such~~

9 ~~portion or portions—~~

10 ~~"(1) will disclose matters necessary to be kept secret~~

11 ~~in the interests of national defense or the necessarily~~

12 ~~confidential conduct of the foreign policy of the United~~

13 ~~States;~~

14 ~~"(2) will relate solely to matters of committee staff~~

15 ~~personnel or internal staff management or administration;~~

16 ~~"(3) will tend to charge with crime or misconduct,~~

17 ~~or to disgrace any person, or will represent a clearly~~

18 ~~unwarranted invasion of the privacy of any individual:~~

19 ~~*Provided*, That this paragraph shall not apply to any~~

20 ~~Government officer or employee with respect to his of-~~

21 ~~ficial duties or employment: *And provided further*, That~~

22 ~~as applied to a witness at a meeting, this paragraph shall~~

23 ~~not apply unless the witness requests in writing that the~~

24 ~~hearing be closed to the public;~~

25 ~~"(4) will disclose information pertaining to any~~

~~investigation conducted for law enforcement purposes, but only to the extent that the disclosure would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (D) disclose investigative techniques and procedures, or (E) endanger the life or physical safety of law enforcement personnel; or~~

~~"(5) will disclose information relating to the trade secrets or financial or commercial information pertaining specifically to a given person where—~~

~~"(A) a Federal statute requires the information to be kept confidential by Government officers and employees; or~~

~~"(B) the information has been obtained by the Federal Government on a confidential basis other than through an application by such person for a specific Government financial or other benefit, and the information must be kept secret in order to pre-~~

1 ~~vent grave and irreparable injury to the competitive~~
2 ~~position of such person.~~
3 ~~A separate vote of the committee shall be taken with respect~~
4 ~~to each committee or subcommittee meeting a portion or~~
5 ~~portions of which are proposed to be closed to the public~~
6 ~~pursuant to this subsection. The vote of each committee~~
7 ~~member participating in each such vote shall be recorded~~
8 ~~and no proxies shall be allowed. Within one day of such~~
9 ~~vote, the committee shall make publicly available a written~~
10 ~~copy of such vote and, if a meeting or portion thereof is~~
11 ~~closed to the public, a full written explanation of its action.~~
12 ~~"(b) Each joint committee, subcommittee, and commit-~~
13 ~~tee of conference shall make public announcement of the~~
14 ~~date, place, and subject matter of each meeting at least one~~
15 ~~week before such meeting unless the committee or subcom-~~
16 ~~mittee determines by a vote of a majority of a quorum of~~
17 ~~the committee or subcommittee present that committee busi-~~
18 ~~ness requires that such meeting be called at an earlier date,~~
19 ~~in which case the committee shall make public announce-~~
20 ~~ment of the date, place, and subject matter of such meeting~~
21 ~~at the earliest practicable opportunity.~~
22 ~~"(c) A complete transcript shall be made of each meet-~~
23 ~~ing of each joint committee, subcommittee, and committee~~
24 ~~of conference (whether open or closed to the public). Ex-~~

1 ~~cept as provided in subsection (d) of this section, a copy~~
2 ~~of each such transcript shall be made available for public~~
3 ~~inspection within seven days of each such meeting, and addi-~~
4 ~~tional copies of any transcript shall be furnished to any per-~~
5 ~~son at the actual cost of duplication. Notwithstanding the~~
6 ~~provisions of subsection (d), in the case of meetings closed~~
7 ~~to the public, the portion of such transcript made available~~
8 ~~for public inspection shall include a list of all persons~~
9 ~~attending and their affiliation, except for any portion of~~
10 ~~such list which would disclose the identity of a confidential~~
11 ~~source, or endanger the life or physical safety of law enforce-~~
12 ~~ment personnel.~~
13 ~~"(d) In the case of meetings closed to the public pur-~~
14 ~~suant to subsection (a) of this section, the joint committee,~~
15 ~~subcommittee, or committee of conference may delete from~~
16 ~~the copies of transcripts that are required to be made avail-~~
17 ~~able or furnished to the public pursuant to subsection (c) of~~
18 ~~this section, those portions which it determines by vote of the~~
19 ~~majority of a quorum of the committee or subcommittee con-~~
20 ~~sist of materials specified in paragraph (1), (2), (3), (4),~~
21 ~~or (5) of subsection (a) of this section. A separate vote of~~
22 ~~the committee or subcommittee shall be taken with respect to~~
23 ~~the transcript of such meeting. The vote of each committee or~~
24 ~~subcommittee member participating in each such vote shall~~
25 ~~be recorded and published, and no proxies shall be allowed.~~
26 ~~In place of each portion deleted from copies of the transcript~~

1 ~~made available to the public, the committee or subcommittee~~
2 ~~shall supply a full written explanation of why such portion~~
3 ~~was deleted, and a summary of the substance of the deleted~~
4 ~~portion that does not itself disclose information specified in~~
5 ~~paragraph (1), (2), (3), (4), or (5) of subsection (a) of~~
6 ~~this section. The committee or subcommittee shall maintain~~
7 ~~a complete copy of the transcript of each meeting (including~~
8 ~~those portions deleted from copies made available to the pub-~~
9 ~~lic), for a period of at least one year after such meeting, or~~
10 ~~until the Congress following the one in which such meeting~~
11 ~~was held is assembled, whichever occurs later.~~
12 ~~"(e) A point of order may be raised against any com-~~
13 ~~mittee vote of a joint committee, subcommittee, or committee~~
14 ~~of conference to close a meeting to the public pursuant to sub-~~
15 ~~section (a) of this section, or any committee or subcommittee~~
16 ~~vote to delete from the publicly available copy a portion of a~~
17 ~~meeting transcript pursuant to subsection (d) of this section~~
18 ~~by committee or subcommittee members comprising one-~~
19 ~~fourth or more of the total number of the members of such~~
20 ~~committee or subcommittee present and voting for or against~~
21 ~~such action. Any such point of order shall be raised in either~~
22 ~~House within two calendar days after the vote against which~~
23 ~~the point of order is raised, and such point of order shall be~~
24 ~~a matter of highest personal privilege. Each such point of~~

1 ~~order shall immediately be referred to a Select Joint Com-~~
2 ~~mittee on Meetings consisting of the President pro tempore~~
3 ~~of the Senate, the Speaker of the House of Representatives,~~
4 ~~and the majority and minority leaders from each House. The~~
5 ~~select committee shall examine the complete verbatim tran-~~
6 ~~script of the meeting in question and shall rule whether the~~
7 ~~vote to close the meeting was in accordance with subsection~~
8 ~~(a) of this section, or whether the vote to delete a portion or~~
9 ~~portions from publicly available copies of the meeting tran-~~
10 ~~script was in accordance with subsection (d) of this section,~~
11 ~~as the case may be. The select committee shall report to both~~
12 ~~Houses a concurrent resolution within five calendar days~~
13 ~~(excluding days where either House is not in session) con-~~
14 ~~taining its findings. If both Houses adopt such a resolution~~
15 ~~finding that the committee vote in question was not in~~
16 ~~accordance with the relevant subsection, they shall direct~~
17 ~~that there be made publicly available the entire transcript of~~
18 ~~the meeting improperly closed to the public, or the portion~~
19 ~~or portions of any meeting transcript improperly deleted from~~
20 ~~the publicly available copy, as the case may be.~~
21 ~~"(f) The Select Joint Committee on Meetings shall not~~
22 ~~be subject to the provisions of subsection (a), (b), (c), or~~
23 ~~(d) of this section."~~
24 ~~(b) Title I of the table of contents of the Legislative Re-~~
25 ~~organization Act of 1946 is amended by inserting immedi-~~

1 ~~ately below item 133C, as added by section 101(c) of this~~
2 ~~Act, the following:~~
~~"133D. Open joint and conference committee meetings.".~~
3 ~~SEC. 104. EXERCISE OF RULEMAKING POWERS.—The~~
4 ~~provisions of this title are enacted by the Congress—~~
5 ~~(1) as an exercise of the rulemaking power of the~~
6 ~~Senate and the House of Representatives, respectively,~~
7 ~~and as such they shall be considered as part of the rules~~
8 ~~of each House, respectively, or of that House to which~~
9 ~~they specifically apply, and such rules shall supersede~~
10 ~~other rules only to the extent that they are inconsistent~~
11 ~~therewith; and~~
12 ~~(2) with full recognition of the constitutional right~~
13 ~~of either House to change such rules (so far as relating~~
14 ~~to such House) at any time, in the same manner, and to~~
15 ~~the same extent as in the case of any other rule of such~~
16 ~~House.~~
17 ~~TITLE II—AGENCY PROCEDURES~~
18 ~~SEC. 201. (a) This section applies, according to the~~
19 ~~provisions thereof, to any agency, as defined in section 551~~
20 ~~(1) of title 5, United States Code, where the body compris-~~
21 ~~ing the agency consists of two or more members. Except as~~
22 ~~provided in subsection (b), all meetings (including meetings~~
23 ~~to conduct hearings) of such agencies, or a subdivision there-~~
24 ~~of authorized to take action on behalf of the agency, shall be~~

~~open to the public. For purposes of this section, a meeting consists of any procedure by which official agency business is considered or discussed by at least the number of agency members (or of members of a subdivision of the agency authorized to take action on behalf of the agency), required to take action on behalf of the agency.~~

~~(b) Subsection (a) shall not apply to any portion or portions of an agency meeting where the agency determines by a vote of a majority of its entire membership, or, in the case of a subdivision thereof authorized to take action on behalf of the agency, a majority of the membership of such subdivision, that such portion or portions of the meeting—~~

~~(1) will disclose matters necessary to be kept secret in the interests of national defense or the necessarily confidential conduct of the foreign policy of the United States;~~

~~(2) will relate solely to individual agency personnel or to internal agency office management and administration or financial auditing;~~

~~(3) will tend to charge with crime or misconduct, or to disgrace any person, or will represent a clearly unwarranted invasion of the privacy of any individual: *Provided*, That this paragraph shall not apply to any Government officer or employee with respect to his official duties or employment: *And provided further*, That~~

~~as applied to a witness at a meeting this paragraph shall not apply unless the witness requests in writing that the meeting be closed to the public;~~

~~(4) will disclose information pertaining to any investigation conducted for law enforcement purposes, but only to the extent that the disclosure would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (D) disclose investigative techniques and procedures, (E) endanger the life or physical safety of law enforcement personnel; or (F) in the case of an agency authorized to regulate the issuance or trading of securities, disclose information concerning such securities, or the markets in which they are traded, when such information must be kept confidential in order to avoid premature speculation in the trading of such securities; or~~

~~(5) will disclose information relating to the trade secrets or financial or commercial information pertaining specifically to a given person where—~~

1 ~~(A) a Federal statute requires the information~~
2 ~~to be kept confidential by Government officers and~~
3 ~~employees; or~~
4 ~~(B) the information has been obtained by the~~
5 ~~Federal Government on a confidential basis other~~
6 ~~than through an application by such person for a~~
7 ~~specific Government financial or other benefit and~~
8 ~~the information must be kept secret in order to pre-~~
9 ~~vent grave and irreparable injury to the competitive~~
10 ~~position of such person;~~
11 ~~(6) will relate to the conduct or disposition (but~~
12 ~~not the initiation) of a case of adjudication governed by~~
13 ~~the provisions of the first paragraph of section 554 (a)~~
14 ~~of title 5, United States Code, or of subsection (1),~~
15 ~~(2), (4), (5), or (6) thereof.~~
16 ~~A separate vote of the agency members, or the members of~~
17 ~~a subdivision thereof authorized to take action on behalf of~~
18 ~~the agency, shall be taken with respect to each agency~~
19 ~~meeting a portion or portions of which are proposed to~~
20 ~~be closed to the public pursuant to this subsection. The vote~~
21 ~~of each agency member participating in such vote shall be~~
22 ~~recorded and no proxies shall be allowed. Within one day of~~
23 ~~such vote, the agency shall make publicly available a written~~
24 ~~copy of such vote and, if a meeting or portion thereof is closed~~
25 ~~to the public, a full written explanation of its action.~~

1 ~~(c) Each agency shall make public announcement of~~
2 ~~the date, place, and subject matter of each meeting, and~~
3 ~~whether open or closed to the public, at least one week before~~
4 ~~each meeting. Such announcement shall be made unless the~~
5 ~~agency determines by a vote of the majority of its members,~~
6 ~~or in the case of a subdivision thereof authorized to take~~
7 ~~action on behalf of the agency, a majority of the members of~~
8 ~~the subdivision, that agency business requires that such meet-~~
9 ~~ings be called at an earlier date, in which case the agency~~
10 ~~shall make public announcement of the date, place, and sub-~~
11 ~~ject matter of such meeting, and whether open or closed to~~
12 ~~the public, at the earliest practicable opportunity.~~
13 ~~(d) A complete transcript or electronic recording ad-~~
14 ~~equate to fully record the proceedings shall be made of each~~
15 ~~meeting of each agency (whether open or closed to the pub-~~
16 ~~lic). Except as provided in subsection (e) of this section a~~
17 ~~copy of the transcript or electronic recording of each such~~
18 ~~meeting, together with any official minutes of such meeting,~~
19 ~~shall be made available to the public for inspection, and~~
20 ~~additional copies of any such transcript, minutes, or record-~~
21 ~~ing (or a copy of a transcription of the electronic recording),~~
22 ~~shall be furnished to any person at the actual cost of duplica-~~
23 ~~tion or transcription. Notwithstanding the provisions of sub-~~
24 ~~section (c), in the case of meetings closed to the public,~~
25 ~~the portion of such transcript made available for public~~
26 ~~inspection or electronic recording shall include a list~~

~~of all persons attending and their affiliation, except for any portion of such list which would disclose the identity of a confidential source, or endanger the life or physical safety of law enforcement personnel.~~

~~(c) In the case of meetings closed to the public pursuant to subsection (b) of this section, the agency may delete from the copies of transcripts, electronic recordings, and minutes made available or furnished to the public pursuant to subsection (d) of this section, those portions which the agency determines by vote of a majority of its membership consist of materials specified in paragraph (1), (2), (3), (4), (5), or (6) of subsection (b) of this section. A separate vote of the agency shall be taken with respect to each transcript, electronic recording, or minutes. The vote of each agency member participating in such vote shall be recorded and published, and no proxies shall be allowed. In place of each portion deleted from copies of the meeting transcript, electronic recording, and minutes made available to the public, the agency shall supply a full written explanation of why such portion was deleted and a summary of the substance of the deleted portion that does not itself disclose information specified in paragraph (1), (2), (3), (4), (5), or (6) of subsection (b). The agency shall maintain a complete verbatim copy of the transcript, or a complete electronic recording of each meeting (including those portions deleted from~~

1 ~~copies made available to the public), for a period of at least~~
2 ~~two years after such meeting, or until one year after the con-~~
3 ~~clusion of any proceeding with respect to which the meeting,~~
4 ~~or a portion thereof, was held, whichever occurs later.~~
5 ~~(f) Each agency subject to the requirements of this sec-~~
6 ~~tion shall, within three hundred and sixty days after the en-~~
7 ~~actment of this Act, following consultation with the Ad-~~
8 ~~ministrative Conference of the United States and published~~
9 ~~notice in the Federal Register of at least thirty days and~~
10 ~~opportunity for written comment by any persons, promulgate~~
11 ~~regulations to implement the requirements of subsections (a)~~
12 ~~through (e) inclusive of this section. Such regulations must,~~
13 ~~prior to final promulgation, receive the approval in writing~~
14 ~~of the Assistant Attorney General, office of Legal Counsel,~~
15 ~~certifying that in his opinion the regulations are in accord~~
16 ~~with the requirements of this section. Any citizen or person~~
17 ~~resident in the United States may bring a proceeding in the~~
18 ~~United States Court of Appeals for the District of Columbia~~
19 Circuit—
20 ~~(1) to require an agency to promulgate such regu-~~
21 ~~lations if such agency has not promulgated such regu-~~
22 ~~lations within the time period specified herein; or~~
23 ~~(2) to set aside agency regulations issued pursu-~~
24 ~~ant to this subsection that are not in accord with the~~
25 ~~requirements of subsections (a) through (e) inclusive~~

~~of this section, and to require the promulgation of regulations that are in accord with such subsections.~~

~~(g) The district courts of the United States shall have jurisdiction to enforce the requirements of subsections (a) through (c) inclusive of this section by declaratory judgment, injunctive relief, or otherwise. Such actions shall be brought within sixty days after the meeting whose closing is challenged as a violation of this section: *Provided*, That if public notice of such meeting was not provided by the agency in accordance with the requirements of this section, such action shall be brought within sixty days of such meeting or such public announcement, whichever is the later. Such actions shall be brought against an agency and its members by any citizen or person resident in the United States. Such actions may be brought in the district wherein the plaintiff resides, or has his principal place of business, or where the agency in question has its headquarters. In such actions a defendant shall serve his answer within twenty days after the service of the complaint. The burden is on the agency to sustain its action. Except as to causes the court considers of greater importance, proceedings before the district court, as authorized by this paragraph, take precedence on the docket over all other causes and shall be assigned a hearing and trial at the earliest practicable date and expedited in every way. In deciding such cases the court may examine~~

1 ~~any portion of a meeting transcript or electronic recording~~
2 ~~that was deleted from the publicly available copy and may~~
3 ~~take such additional evidence as it deems necessary. Among~~
4 ~~other forms of equitable relief, including the granting of an~~
5 ~~injunction against future violations of this section, the court~~
6 ~~may require that any portion of a meeting transcript or elec-~~
7 ~~tronic recording improperly deleted from the publicly avail-~~
8 ~~able copy be made publicly available for inspection and copy-~~
9 ~~ing, and, having due regard for orderly administration and~~
10 ~~the public interest, may set aside any agency action taken~~
11 ~~or discussed at an agency meeting improperly closed to the~~
12 ~~public. The jurisdiction of the district courts under this sub-~~
13 ~~section shall be concurrent with that of any other court other-~~
14 ~~wise authorized by law to review agency action. Any such~~
15 ~~court may, at the application of any person otherwise prop-~~
16 ~~erly a party to a proceeding before such court to review an~~
17 ~~agency action, inquire into asserted violations by the agency~~
18 ~~of the requirements of this section and afford the relief au-~~
19 ~~thorized by this section in the case of proceedings by district~~
20 ~~courts.~~
21 ~~(h) In any action brought pursuant to subsection (f)~~
22 ~~or (g) of this section, the reasonable costs of litigation (in-~~
23 ~~cluding reasonable fees for attorneys and expert witnesses)~~
24 ~~may be apportioned to the original parties or their successors~~
25 ~~in interest whenever the court determines such award is ap-~~

1 ~~propriate. In the case of apportionment of costs against an~~
2 ~~agency or its members, the costs may be assessed by the~~
3 ~~court against the United States.~~
4 ~~(i) The agencies subject to the requirements of this~~
5 ~~section shall annually report to Congress regarding their~~
6 ~~compliance with such requirements, including a tabulation~~
7 ~~of the total number of agency meetings open to the public,~~
8 ~~the total number of meetings closed to the public, the rea-~~
9 ~~sons for closing such meetings, and a description of any~~
10 ~~litigation brought against the agency under this section.~~
11 ~~SEC. 202. Title 5 of the United States Code is amended~~
12 ~~by adding after section 557 the following:~~
13 ~~"EX PARTE COMMUNICATIONS IN AGENCY PROCEEDING~~
14 ~~"SEC. 557A. (a) DEFINITIONS.—For purposes of this~~
15 ~~section—~~
16 ~~"(1) 'Ex parte communication' means a com-~~
17 ~~munication relevant to an on-the-record agency pro-~~
18 ~~ceeding where such communication is not made on the~~
19 ~~record, or openly at a scheduled hearing session in such~~
20 ~~proceeding, and reasonable notice thereof is not given to~~
21 ~~all parties to, or intervenors in, such proceedings.~~
22 ~~"(2) 'Interested person' means any person (includ-~~
23 ~~ing a member or employee of any Government agency or~~
24 ~~authority) other than a member or employee of the~~

1 ~~agency before which the on-the-record proceeding is~~
2 ~~pending who communicates with an agency member or~~
3 ~~employee with respect to any such on-the-record agency~~
4 ~~proceeding.~~
5 ~~"(3) 'On-the-record agency proceeding' means any~~
6 ~~proceedings before any agency where the agency action,~~
7 ~~or a portion thereof, is required by law to be determined~~
8 ~~on the record after an opportunity for an agency hearing.~~
9 ~~"(b) This section applies to any on-the-record agency~~
10 ~~proceeding.~~
11 ~~"(c) In any agency proceeding which is subject to sub-~~
12 ~~section (b) of this section—~~
13 ~~"(1) no interested person shall make or cause to be~~
14 ~~made to any member of the agency in question, admini-~~
15 ~~trative judge, or employee who is or may be involved in~~
16 ~~the decisional process of the proceeding any ex parte~~
17 ~~communication;~~
18 ~~"(2) no member of the agency in question, admini-~~
19 ~~trative judge, or employee who is or may be involved in~~
20 ~~the decisional process of the proceeding shall make or~~
21 ~~cause to be made to an interested person any ex parte~~
22 ~~communication;~~
23 ~~"(3) a member of the agency in question, admini-~~
24 ~~trative judge, or employee who is or may be involved~~

~~in the decisional process of the proceeding, who receives a communication in violation of this subsection, shall place in the public record of the proceeding—~~

~~"(A) any written material submitted in violation of this subsection; and~~

~~"(B) a memorandum stating the substance of each oral communication submitted in violation of this subsection; and~~

~~"(C) responses, if any, to the materials described in subparagraphs (A) and (B) of this subsection;~~

~~"(4) upon obtaining knowledge of a communication in violation of this subsection prompted by or from a party or intervenors to any proceeding to which this section applies, the agency members or member, the administrative judge, or employee presiding at the hearings may, to the extent consistent with the interests of justice and the policy of the underlying statutes, require the party or intervenors to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected by virtue of such violation.~~

~~"(d) The prohibitions of this section shall not apply—~~

~~"(1) to any proceeding to the extent required for the disposition of ex parte matters as authorized by law;~~

1 "~~(2) to any written communication from persons~~
2 ~~who are neither parties or intervenors to the proceeding,~~
3 ~~nor government officials acting in their official capacity,~~
4 ~~where such communications are promptly placed in the~~
5 ~~public docket file of the proceedings.~~
6 "~~(e) The prohibitions of this section shall apply at~~
7 ~~such time as the agency shall designate, having due regard~~
8 ~~for the public interest in open decisionmaking by agencies,~~
9 ~~but in no case shall they apply later than the time at which a~~
10 ~~proceeding is noticed for hearing. If the person responsible~~
11 ~~for the communication has knowledge that the proceeding~~
12 ~~will be noticed, the prohibitions of this section shall apply at~~
13 ~~the time of his acquisition of such knowledge. In the case of~~
14 ~~any person who files with an agency any application, petition,~~
15 ~~or other form of request for agency action, the prohibitions~~
16 ~~of this section shall apply, with respect to communications~~
17 ~~with such person, commencing at the time of such filing or~~
18 ~~at the time otherwise provided by this subsection, whichever~~
19 ~~occurs first.~~
20 "~~(f) Every agency notice of an opportunity for partici-~~
21 ~~pation by interested persons in a hearing shall contain a~~
22 ~~statement as follows:~~
23 "~~(1) if such notice relates to an on-the-record~~
24 ~~agency proceeding, it shall state that the proceeding is~~
25 ~~subject to the provisions of this section with respect~~
26 ~~to ex parte communications;~~

1 "~~(2) if such notice relates to an agency proceeding~~
2 ~~not on the record, it shall state that the proceeding is not~~
3 ~~subject to the provisions of this section with respect to~~
4 ~~ex parte communications.~~
5 ~~If a notice of hearing with respect to any proceeding before~~
6 ~~an agency fails to comply with this section, the proceeding~~
7 ~~shall be deemed to be an on-the-record agency proceeding for~~
8 ~~purposes of ex parte communications~~.
9 "~~(g) Each agency subject to the requirements of this~~
10 ~~section shall, within three hundred and sixty days after the~~
11 ~~enactment of this section, following consultation with the~~
12 ~~Administrative Conference of the United States and pub-~~
13 ~~lished notice in the Federal Register of at least thirty days~~
14 ~~and opportunity for written comment, promulgate regulations~~
15 ~~to implement the requirements of this section. Any citizen or~~
16 ~~person resident in the United States may bring a proceeding~~
17 ~~in the United States Court of Appeals for the District of~~
18 ~~Columbia Circuit—~~
19 "~~(1) to require any agency to promulgate regula-~~
20 ~~tions if the agency has not promulgated such regulations~~
21 ~~within the time period specified; or~~
22 "~~(2) to set aside agency regulations issued pursuant~~
23 ~~to this subsection that are not in accord with the require-~~
24 ~~ments of this section, and to require the promulgation~~
25 ~~of regulations that are in accord with this section~~.

1 "~~(h) Nothing in this section shall be construed to per-~~
2 ~~mit any communication which is prohibited by any other~~
3 ~~provision of law, or to prohibit any agency from adopting,~~
4 ~~by rule or otherwise, prohibitions or regulations governing~~
5 ~~ex parte communications which are additional to, or more~~
6 ~~stringent than, the requirements of this section.~~
7 "~~(i) The district courts of the United States shall have~~
8 ~~jurisdiction to enforce the requirements of subsections (c)~~
9 ~~and (e) of this section by declaratory judgment, injunctive~~
10 ~~relief, or otherwise. The action may be brought by any~~
11 ~~citizen of or person resident in the United States. The~~
12 ~~action shall be brought in the district wherein the plaintiff~~
13 ~~resides or has his principal place of business, or where the~~
14 ~~agency in question has its headquarters. Where a person~~
15 ~~other than an agency, agency member, administrative judge,~~
16 ~~or employee is alleged to have participated in a violation of~~
17 ~~the requirements of this section, such person may, but need~~
18 ~~not, be joined as a party defendant; for purposes of joining~~
19 ~~such person as a party defendant, service may be had on~~
20 ~~such person in any district. Among other forms of equitable~~
21 ~~relief, the court may require that any ex parte communica-~~
22 ~~tion made or received in violation of the requirements of this~~
23 ~~section be published, and, having due regard for orderly~~
24 ~~administration and the public interest, may set aside any~~
25 ~~agency action taken in a proceeding where the violation~~

~~occurred. The jurisdiction of the district courts under this subsection shall be concurrent with that of any other court otherwise authorized by law to review agency action. Any such court may, at the application of any person otherwise properly a party to a proceeding before such court to review an agency action, inquire into asserted violations by the agency of the requirements of this section, and afford the relief authorized by this section in the case of proceedings by district courts.~~

~~"(j) In any action brought pursuant to subsection (g) and (i) of this section, cost of litigation (including reasonable fees for attorneys and expert witnesses) may be apportioned to the original parties or their successors in interest whenever the court determines such award is appropriate."~~

~~SEC. 203. This title and the amendments made by this title do not authorize withholding of information or limit the availability of records to the public except as provided in this title. This title does not authorize any information to be withheld from Congress.~~

SECTION 1. SHORT TITLE.—This Act may be cited as the "Government in the Sunshine Act".

SEC. 2. DECLARATION OF POLICY.—It is hereby declared to be the policy of the United States that the public is entitled to the fullest practicable information regarding the decisionmaking processes of the Federal Government.

It is the purpose of this Act to provide the public with such information, while protecting the rights of individuals and the ability of the Government to carry out its responsibilities.

SEC. 3. DEFINITIONS.—For purposes of this Act the term, "person" includes an individual, partnership, corporation, association, or public or private organization other than an agency.

~~*TITLE I—CONGRESSIONAL PROCEDURES*~~

~~*SEC. 101. SENATE COMMITTEE MEETINGS. (a) The Legislative Reorganization Act of 1946 is amended—*~~

~~*(1) by striking out the first sentence of section 133(b);*~~

~~*(2) by adding after section 133B the following:*~~

~~*"OPEN SENATE COMMITTEE MEETINGS*~~

~~*"SEC. 133C. Each meeting of a standing, select, or special committee of the Senate, or any subcommittee thereof, shall be open to the public, except that a portion or portions of any such meeting may be closed to the public if the committee or subcommittee, as the case may be, determines by record vote of a majority of the members of the committee or subcommittee present that the matters to be discussed at such portion or portions—*~~

~~*"(1) will disclose matters necessary to be kept secret in the interests of national defense or the foreign policy of the United States;*~~

1 ~~"(2) will relate solely to matters of committee staff~~
2 ~~personnel or internal staff management or procedure;~~
3 ~~"(3) will tend to charge an individual with crime or~~
4 ~~misconduct, to disgrace or injure the professional standing~~
5 ~~of an individual, or otherwise to expose an individual to~~
6 ~~public contempt or obloquy, or will represent a clearly~~
7 ~~unwarranted invasion of the privacy of an individual;~~
8 ~~"(4) will disclose the identity of any informer or~~
9 ~~law enforcement agent or will disclose any information~~
10 ~~relating to the investigation or prosecution of any viola-~~
11 ~~tion of law that is required to be kept secret in the~~
12 ~~interests of effective law enforcement; or~~
13 ~~"(5) will disclose information relating to the trade~~
14 ~~secrets or financial or commercial information pertaining~~
15 ~~specifically to a given person if—~~
16 ~~"(A) an Act of Congress requires the informa-~~
17 ~~tion to be kept confidential by Government officers~~
18 ~~and employees; or~~
19 ~~"(B) the information has been obtained by the~~
20 ~~Government on a confidential basis, and is required~~
21 ~~to be kept secret in order to prevent undue injury to~~
22 ~~the competitive position of such person.~~
23 ~~This section shall not apply to meetings to conduct hearings.".~~
24 ~~(b) Paragraph 7(b) of Rule XXV of the Standing~~
25 ~~Rules of the Senate is repealed.~~

1 ~~(c) Title I of the table of contents of the Legislative~~
2 ~~Reorganization Act of 1946 is amended by inserting imme-~~
3 ~~diately below item 133B the following:~~
~~"133C. Open Senate committee meetings.".~~
4 ~~SEC. 102. HOUSE OF REPRESENTATIVES COMMITTEE~~
5 ~~MEETINGS.—Clause 2(g)(1) of Rule XI of the Rules of the~~
6 ~~House of Representatives is amended to read as follows:~~
7 ~~"(g)(1) Each meeting of a standing, select, or spe-~~
8 ~~cial committee or subcommittee, shall be open to the public,~~
9 ~~except that a portion or portions of any such meeting may be~~
10 ~~closed to the public if the committee or subcommittee, as the~~
11 ~~case may be, determines by record vote of a majority of the~~
12 ~~members of the committee or subcommittee present that the~~
13 ~~matters to be discussed at such portion or portions—~~
14 ~~"(A) will disclose matters necessary to be kept~~
15 ~~secret in the interests of national defense or the foreign~~
16 ~~policy of the United States;~~
17 ~~"(B) will relate solely to matters of committee staff~~
18 ~~personnel or internal staff management or procedure;~~
19 ~~"(C) will tend to charge an individual with crime~~
20 ~~or misconduct, to disgrace or injure the professional~~
21 ~~standing of an individual, or otherwise to expose an in-~~
22 ~~dividual to public contempt or obloquy, or will represent~~
23 ~~a clearly unwarranted invasion of the privacy of an in-~~
24 ~~dividual;~~

~~"(D) will disclose the identity of any informer or law enforcement agent or will disclose any information relating to the investigation or prosecution of any violation of law that is required to be kept secret in the interests of effective law enforcement; or~~

~~"(E) will disclose information relating to the trade secrets or financial or commercial information pertaining specifically to a given person if—~~

~~"(i) an Act of Congress requires the information to be kept confidential by Government officers and employees; or~~

~~"(ii) the information has been obtained by the Government on a confidential basis, and is required to be kept secret in order to prevent undue injury to the competitive position of such person.~~

~~This clause shall not apply to meetings to conduct hearings.".~~

~~SEC. 103. (a) CONFERENCE COMMITTEES.—The Legislative Reorganization Act of 1946 is amended by inserting after section 133C, as added by section 101(a) of this Act, the following new section:~~

~~"OPEN CONFERENCE COMMITTEE MEETINGS~~

~~"SEC. 133D. Each conference committee between the Senate and the House of Representatives shall be open to the public except when the managers of either the Senate~~

~~or the House of Representatives in open session determine, by a rollcall vote of a majority of those managers present, that all or part of the remainder of the meeting on the day of the vote shall be closed to the public."~~.

~~(b) Title I of the table of contents of the Legislative Reorganization Act of 1946 is amended by inserting immediately below item 133C, as added by section 101(c) of this Act, the following:~~

~~"133D. Open conference committee meetings."~~.

~~SEC. 104. (a) JOINT COMMITTEES.—The Legislative Reorganization Act of 1946 is amended by inserting after section 133D, as added by section 102(a) of this Act, the following new section:~~

~~"OPEN JOINT COMMITTEE MEETINGS~~

~~"SEC. 133E. Each meeting of a joint committee of the Senate and House of Representatives, or any subcommittee thereof, shall be open to the public, except that a portion or portions of any such meeting may be closed to the public if the committee or subcommittee, as the case may be, determines by record vote of a majority of the members of the committee or subcommittee present that the matters to be discussed or the testimony to be taken at such portion or portions—~~

~~"(1) will disclose matters necessary to be kept~~

~~secret in the interests of national defense or the foreign policy of the United States;~~

~~"(2) will relate solely to matters of committee staff personnel or internal staff management or procedure;~~

~~"(3) will tend to charge an individual with crime or misconduct, to disgrace or injure the professional standing of an individual, or otherwise to expose an individual to public contempt or obloquy, or will represent a clearly unwarranted invasion of the privacy of an individual;~~

~~"(4) will disclose the identity of any informer or law enforcement agent or will disclose any information relating to the investigation or prosecution of any violation of law that is required to be kept secret in the interests of effective law enforcement; or~~

~~"(5) will disclose information relating to the trade secrets or financial or commercial information pertaining specifically to a given person if—~~

~~"(A) an Act of Congress requires the information to be kept confidential by Government officers and employees; or~~

~~"(B) the information has been obtained by the Government on a confidential basis, and is required to be kept secret in order to prevent undue injury to the competitive position of such person.~~

~~This section shall not apply to meetings to conduct hearings.".~~

~~(b) Title I of the table of contents of the Legislative Reorganization Act of 1946 is amended by inserting immediately below item 133D, as added by section 103(b) of this Act, the following:~~

~~"133E. Open joint committee meetings.".~~

~~SEC. 105. EXERCISE OF RULEMAKING POWERS. The provisions of this title are enacted by the Congress—~~

~~(1) as an exercise of the rulemaking power of the Senate and the House of Representatives, respectively, and as such they shall be considered as part of the rules of each House, respectively, or of that House to which they specifically apply, and such rules shall supersede other rules only to the extent that they are inconsistent therewith; and~~

~~(2) with full recognition of the constitutional right of either House to change such rules (so far as relating to such House) at any time, in the same manner, and to the same extent as in the case of any other rule of such House.~~

TITLE II—AGENCY PROCEDURES

SEC. 201. (a) This section applies, according to the provisions thereof, to the Federal Election Commission and to any agency, as defined in section 551(1) of title 5, United

1 *States Code, where the collegial body comprising the agency*
2 *consists of two or more individual members, at least a major-*
3 *ity of whom are appointed to such position by the President*
4 *with the advice and consent of the Senate. Except as provided*
5 *in subsection (b), all meetings of such collegial body, or of*
6 *a subdivision thereof authorized to take action on behalf of*
7 *the agency, shall be open to the public. For purposes of this*
8 *section, a meeting means the deliberations of at least the*
9 *number of individual agency members required to take action*
10 *on behalf of the agency where such deliberations concern the*
11 *joint conduct or disposition of official agency business.*
12 *(b) Except where the agency finds that the public in-*
13 *terest requires otherwise, (1) subsection (a) shall not apply*
14 *to any agency meeting, or any portion of an agency meeting,*
15 *or to any meeting, or any portion of a meeting, of a sub-*
16 *division thereof authorized to take action on behalf of the*
17 *agency, and, (2) the requirements of subsections (c) and*
18 *(d) shall not apply to any information pertaining to such*
19 *meeting otherwise required by this section to be disclosed to*
20 *the public, where the agency, or the subdivision thereof con-*
21 *ducting the meeting, properly determines that such portion*
22 *or portions of its meeting, or such information, can be reason-*
23 *ably expected to—*
24 *(1) disclose matters (A) specifically authorized*
25 *under criteria established by an Executive order to be*

1 *kept secret in the interests of national defense or foreign*
2 *policy and (B) are in fact properly classified pursuant*
3 *to such Executive order;*
4 *(2) relate solely to the agency's own internal*
5 *personnel rules and practices;*
6 *(3) disclose information of a personal nature*
7 *where disclosure would constitute a clearly unwarranted*
8 *invasion of personal privacy;*
9 *(4) involve accusing any person of a crime, or*
10 *formally censuring any person;*
11 *(5) disclose information contained in investi-*
12 *gatory records compiled for law enforcement purposes,*
13 *but only to the extent that the disclosure would (A)*
14 *interfere with enforcement proceedings, (B) deprive*
15 *a person of a right to a fair trial or an impartial*
16 *adjudication, (C) constitute an unwarranted invasion*
17 *of personal privacy, (D) disclose the identity of a con-*
18 *fidential source, (E) in the case of a record compiled*
19 *by a criminal law enforcement authority in the course*
20 *of a criminal investigation, or by an agency conducting*
21 *a lawful national security intelligence investigation, dis-*
22 *close confidential information furnished only by the confi-*
23 *dential source, (F) disclose investigative techniques and*
24 *procedures, or (G) endanger the life or physical safety*
25 *of law enforcement personnel;*

1 *(6) disclose trade secrets, or financial or com-*
2 *mercial information obtained from any person, where*
3 *such trade secrets or other information could not be ob-*
4 *tained by the agency without a pledge of confidentiality,*
5 *or where such information must be withheld from the*
6 *public in order to prevent substantial injury to the com-*
7 *petitive position of the person to whom such information*
8 *relates;*
9 *(7) disclose information which must be withheld*
10 *from the public in order to avoid premature disclosure of*
11 *an action or a proposed action by—*
12 *(A) an agency which regulates currencies,*
13 *securities, commodities, or financial institutions*
14 *where such disclosure would (i) lead to serious*
15 *financial speculation in currencies, securities, or*
16 *commodities, or (ii) seriously endanger the stability*
17 *of any financial institution;*
18 *(B) any agency where such disclosure would*
19 *seriously frustrate implementation of the proposed*
20 *agency action, or private action contingent thereon;*
21 *or*
22 *(C) any agency relating to the purchase by*
23 *such agency of real property.*
24 *This paragraph shall not apply in any instance where*
25 *the agency has already disclosed to the public the con-*

1 *tent or nature of its proposed action, or where the agency*
2 *is required by law to make such disclosure on its own*
3 *initiative prior to taking final agency action on such*
4 *proposal;*
5 *(8) disclose information contained in or related to*
6 *examination, operating, or condition reports prepared by,*
7 *on behalf of, or for the use of an agency responsible*
8 *for the regulation or supervision of financial institutions;*
9 *(9) specifically concern the agency's participation*
10 *in a civil action in Federal or State court, or the initia-*
11 *tion, conduct, or disposition by the agency of a particular*
12 *case of formal agency adjudication pursuant to the proce-*
13 *dures in section 554 of title 5, United States Code, or*
14 *otherwise involving a determination on the record after*
15 *opportunity for a hearing; or*
16 *(10) disclose information required to be withheld*
17 *from the public by any other statute establishing particu-*
18 *lar criteria or referring to particular types of*
19 *information.*
20 *(c)(1) Action under subsection (b) shall be taken only*
21 *when a majority of the entire membership of the agency, or*
22 *of the subdivision thereof authorized to conduct the meeting*
23 *on behalf of the agency, votes to take such action. A separate*
24 *vote of the agency members, or the members of a subdivision*
25 *thereof, shall be taken with respect to each agency meeting a*

1 *portion or portions of which are proposed to be closed to the*
2 *public pursuant to subsection (b), or with respect to any*
3 *information which is proposed to be withheld under subsec-*
4 *tion (b). A single vote may be taken with respect to a series*
5 *of meetings, a portion or portions of which are proposed to*
6 *be closed to the public, or with respect to any information*
7 *concerning such series of meetings, so long as each meeting in*
8 *such series involves the same particular matters, and is*
9 *scheduled to be held no more than thirty days after the initial*
10 *meeting in such series. The vote of each agency member par-*
11 *ticipating in such vote shall be recorded and no proxies shall*
12 *be allowed. Whenever any person whose interests may be*
13 *directly affected by a meeting requests that the agency close*
14 *a portion or portions of the meeting to the public for any of*
15 *the reasons referred to in paragraphs (3), (4), or (5) of*
16 *subsection (b), the agency shall vote whether to close such*
17 *meeting, upon request of any one of its members. Within one*
18 *day of any vote taken pursuant to this paragraph, the agency*
19 *shall make publicly available a written copy of such vote.*
20 *(2) If a meeting or portion thereof is closed to the*
21 *public, the agency shall, within one day of the vote taken*
22 *pursuant to paragraph (1) of this subsection, make publicly*
23 *available a full written explanation of its action closing the*
24 *meeting, or portion thereof, together with a list of all persons*
25 *expected to attend the meeting, and their affiliation.*

1 *(3) Any agency, a majority of whose meetings will*
2 *properly be closed to the public, in whole or in part, pursuant*
3 *to paragraphs (6), (7)(A), (8), or (9) of subsection (b),*
4 *or any combination thereof, may provide by regulation for*
5 *the closing of such meetings, or portion of such meetings, so*
6 *long as a majority of the members of the agency, or of the*
7 *subdivision thereof conducting the meeting, votes at the begin-*
8 *ning of such meeting, or portion thereof, to close the meeting,*
9 *and a copy of such vote is made available to the public. The*
10 *provisions of this subsection, and subsection (d), shall not*
11 *apply to any meeting to which such regulations apply: Pro-*
12 *vided, That the agency shall, except to the extent that the*
13 *provisions of subsection (b) may apply, provide the public*
14 *with public announcement of the date, place, and subject mat-*
15 *ter of the meeting at the earliest practicable opportunity.*
16 *(d) In the case of each meeting, the agency shall make*
17 *public announcement, at least one week before the meeting,*
18 *of the date, place, and subject matter of the meeting, whether*
19 *open or closed to the public, and the name and phone number*
20 *of the official designated by the agency to respond to requests*
21 *for information about the meeting. Such announcement*
22 *shall be made unless a majority of the members of the agency.*
23 *or of the members of the subdivision thereof conducting the*
24 *meeting, determines by a vote that agency business requires*
25 *that such meetings be called at an earlier date, in which case*

1 *the agency shall make public announcement of the date, place,*
2 *and subject matter of such meeting, and whether open or*
3 *closed to the public, at the earliest practicable opportunity.*
4 *The subject matter of a meeting, or the determination of the*
5 *agency to open or close a meeting, or portion of a meeting,*
6 *to the public, may be changed following the public announce-*
7 *ment required by this paragraph if, (1) a majority of the*
8 *entire membership of the agency, or of the subdivision*
9 *thereof conducting the meeting, determines by a vote that*
10 *agency business so requires, and that no earlier announce-*
11 *ment of the change was possible, and, (2) the agency pub-*
12 *licly announces such change at the earliest practicable oppor-*
13 *tunity. Immediately following the public announcement re-*
14 *quired by this paragraph, notice of such announcement shall*
15 *also be submitted for publication in the Federal Register.*
16 *(e) A complete transcript or electronic recording ade-*
17 *quate to fully record the proceedings shall be made of each*
18 *meeting, or portion of a meeting, closed to the public, ex-*
19 *cept for a meeting, or portion of a meeting, closed to the*
20 *public pursuant to paragraph (9) of subsection (b). The*
21 *agency shall make promptly available to the public, in a place*
22 *easily accessible to the public, the complete transcript or elec-*
23 *tronic recording of the discussion at such meeting of any*
24 *item on the agenda, or of the testimony of any witness re-*
25 *ceived at such meeting, where no significant portion of such*

1 *discussion or testimony contains any information specified*
2 *in paragraphs (1) through (10) of subsection (b). Copies*
3 *of such transcript, or a transcription of such electronic re-*
4 *cording disclosing the identity of each speaker, shall be fur-*
5 *nished to any person at the actual cost of duplication or*
6 *transcription. The agency shall maintain a complete ver-*
7 *batim copy of the transcript, or a complete electronic record-*
8 *ing of each meeting, or portion of a meeting, closed to the*
9 *public, for a period of at least two years after such meeting,*
10 *or until one year after the conclusion of any agency pro-*
11 *ceeding with respect to which the meeting, or a portion thereof,*
12 *was held, whichever occurs later.*
13 *(f) Each agency subject to the requirements of this sec-*
14 *tion shall, within one hundred and eighty days after the en-*
15 *actment of this Act, following consultation with the Office of*
16 *the Chairman of the Administrative Conference of the United*
17 *States and published notice in the Federal Register of at least*
18 *thirty days and opportunity for written comment by any*
19 *persons, promulgate regulations to implement the require-*
20 *ments of subsections (a) through (e) of this section. Any*
21 *person may bring a proceeding in the United States Dis-*
22 *trict Court for the District of Columbia to require an agency*
23 *to promulgate such regulations if such agency has not pro-*
24 *mulgated such regulations within the time period specified*
25 *herein. Any person may bring a proceeding in the United*

1 *States Court of Appeals for the District of Columbia to set*
2 *aside agency regulations issued pursuant to this subsection*
3 *that are not in accord with the requirements of subsections (a)*
4 *through (e) of this section, and to require the promulga-*
5 *tion of regulations that are in accord with such subsections.*
6 *(g) The district courts of the United States have juris-*
7 *diction to enforce the requirements of subsections (a) through*
8 *(e) of this section by declaratory judgment, injunctive relief,*
9 *or other relief as may be appropriate. Such actions may be*
10 *brought by any person against an agency or its members*
11 *prior to, or within sixty days after, the meeting out of which*
12 *the violation of this section arises, except that if public an-*
13 *nouncement of such meeting is not initially provided by the*
14 *agency in accordance with the requirements of this section,*
15 *such action may be instituted pursuant to this section at any*
16 *time prior to sixty days after any public announcement of*
17 *such meeting. Before bringing such action, the plaintiff*
18 *shall first notify the agency of his intent to do so, and allow*
19 *the agency a reasonable period of time, not to exceed ten*
20 *days, to correct any violation of this section, except that*
21 *such reasonable period of time shall not be held to exceed*
22 *two working days where notification of such violation is*
23 *made prior to a meeting which the agency has voted to close.*
24 *Such actions may be brought in the district wherein the*
25 *plaintiff resides, or has his principal place of business, or*

1 *where the agency in question has its headquarters. In such*
2 *actions a defendant shall serve his answer within twenty days*
3 *after the service of the complaint. The burden is on the*
4 *defendant to sustain his action. In deciding such cases the*
5 *court may examine in camera any portion of a transcript or*
6 *electronic recording of a meeting closed to the public, and*
7 *may take such additional evidence as it deems necessary. The*
8 *court, having due regard for orderly administration and the*
9 *public interest, as well as the interests of the party, may*
10 *grant such equitable relief as it deems appropriate, includ-*
11 *ing granting an injunction against future violations of this*
12 *section, or ordering the agency to make available to the public*
13 *the transcript or electronic recording of any portion of a*
14 *meeting improperly closed to the public. Except to the extent*
15 *provided in subsection (h) of this section, nothing in this sec-*
16 *tion confers jurisdiction on any district court to set aside*
17 *or invalidate any agency action taken or discussed at an*
18 *agency meeting out of which the violation of this section*
19 *arose.*
20 *(h) Any Federal court otherwise authorized by law to*
21 *review agency action may, at the application of any person*
22 *properly participating in the proceeding pursuant to other*
23 *applicable law, inquire into violations by the agency of the*
24 *requirements of this section, and afford any such relief as it*
25 *deems appropriate.*

1 *(i) The court may assess against any party reason-*
2 *able attorney fees and other litigation costs reasonably in-*
3 *curred by any other party who substantially prevails in any*
4 *action brought in accordance with the provisions of sub-*
5 *section (f), (g), or (h) of this section. Costs may be*
6 *assessed against an individual member of an agency only in*
7 *the case where the court finds such agency member has*
8 *intentionally and repeatedly violated this section, or against*
9 *the plaintiff where the court finds that the suit was initiated*
10 *by the plaintiff for frivolous or dilatory purposes. In the*
11 *case of apportionment of costs against an agency, the costs*
12 *may be assessed by the court against the United States.*
13 *(j) The agencies subject to the requirements of this*
14 *section shall annually report to Congress regarding their*
15 *compliance with such requirements, including a tabulation*
16 *of the total number of agency meetings open to the public,*
17 *the total number of meetings closed to the public, the rea-*
18 *sons for closing such meetings, and a description of any*
19 *litigation brought against the agency under this section.*
20 *SEC. 202. (a) Section 557 of title 5, United States*
21 *Code, is amended by adding at the end thereof the following*
22 *new subsection:*
23 *"(d) In any agency proceeding which is subject to sub-*
24 *section (a) of this section, except to the extent required for*
25 *the disposition of ex parte matters as authorized by law—*

1 *"(1) no interested person outside the agency shall*
2 *make or knowingly cause to be made to any member of*
3 *the body comprising the agency, administrative law*
4 *judge, or other employee who is or may reasonably be*
5 *expected to be involved in the decisional process of the*
6 *proceeding, an ex parte communication relevant to the*
7 *merits of the proceeding;*
8 *"(2) no member of the body comprising the agency,*
9 *administrative law judge, or other employee who is or*
10 *may reasonably be expected to be involved in the decisional*
11 *process of the proceeding, shall make or knowingly*
12 *cause to be made to an interested person outside the*
13 *agency an ex parte communication relevant to the merits*
14 *of the proceeding;*
15 *"(3) a member of the body comprising the agency,*
16 *administrative law judge, or other employee who is or*
17 *may reasonably be expected to be involved in the deci-*
18 *sional process of such proceeding who receives, or who*
19 *makes, a communication in violation of this subsection,*
20 *shall place on the public record of the proceeding:*
21 *"(A) written communications transmitted in*
22 *violation of this subsection;*
23 *"(B) memorandums stating the substance of all*
24 *oral communications occurring in violation of this*
25 *subsection; and*

1 *"(C) responses to the materials described in sub-*
2 *paragraphs (A) and (B) of this subsection;*
3 *"(4) upon receipt of a communication knowingly*
4 *made by a party, or which was knowingly caused to be*
5 *made by a party in violation of this subsection; the*
6 *agency, administrative law judge, or other employee*
7 *presiding at the hearing may, to the extent consistent*
8 *with the interests of justice and the policy of the under-*
9 *lying statutes, require the person or party to show cause*
10 *why his claim or interest in the proceeding should not*
11 *be dismissed, denied, disregarded, or otherwise adversely*
12 *affected by virtue of such violation;*
13 *"(5) the prohibitions of this subsection shall apply*
14 *at such time as the agency may designate, but in no case*
15 *shall they apply later than the time at which a proceeding*
16 *is noticed for hearing unless the person responsible for*
17 *the communication has knowledge that it will be noticed,*
18 *in which case the prohibitions shall apply at the time of*
19 *his acquisition of such knowledge.".*
20 *(b) The second sentence of section 554(d) of title 5,*
21 *United States Code, is amended to read as follows: "Such*
22 *employee may not be responsible to or subject to the super-*
23 *vision or direction of an employee or agent engaged in the*
24 *performance of investigative or prosecuting functions for an*
25 *agency.".*

1 *(c) Section 551 of title 5, United States Code, is*
2 *amended—*
3 *(1) by striking out "and" at the end of paragraph*
4 *(12);*
5 *(2) by striking out the "act." at the end of para-*
6 *graph (13) and inserting in lieu thereof "act; and"*
7 *(3) by adding at the end thereof the following new*
8 *paragraph:*
9 *"(14) 'ex parte communication' means an oral or*
10 *written communication not on the public record with*
11 *respect to which reasonable prior notice to all parties is*
12 *not given.".*
13 *(d) Section 556(d) of title 5, United States Code, is*
14 *amended by inserting between the third and fourth sentences*
15 *thereof the following new sentence: "The agency may, to the*
16 *extent consistent with the interests of justice and the policy*
17 *of the underlying statutes administered by the agency, con-*
18 *sider a violation of section 557(d) of this title sufficient*
19 *grounds for a decision adverse to a party who has knowingly*
20 *committed such violation or knowingly caused such violation*
21 *to occur.".*
22 *SEC. 203. (a) Except as specifically provided by section*
23 *201, nothing in section 201 confers any additional rights*
24 *on any person, or limits the present rights of any such*
25 *person, to inspect or copy, under section 552 of title 5,*

80-459 O - 77 - 21

1 *United States Code, any documents or other written ma-*
2 *terial within the possession of any agency. In the case of*
3 *any request made pursuant to section 552 of title 5,*
4 *United States Code, to copy or inspect the transcripts*
5 *or electronic recordings described in section 201(e),*
6 *the provisions of this Act shall govern whether such tran-*
7 *scripts or electronic recordings shall be made available in*
8 *accordance with such request. The requirements of chapter*
9 *33, of title 44, United States Code, shall not apply to the*
10 *transcripts and electronic recordings described in section 201*
11 *(e). This title does not authorize any information to be with-*
12 *held from Congress.*
13 *(b) Nothing in section 201 authorizes any agency to*
14 *withhold from any individual any record, including tran-*
15 *scripts or electronic recordings required by this Act, which*
16 *is otherwise accessible to that individual under section 552a*
17 *of title 5, United States Code.*
18 *SEC. 204. The provisions of this title shall become ef-*
19 *fective one hundred and eighty days after the date on which*
20 *this Act is enacted, except that the provisions of section 201*
21 *requiring the issuance of regulations to implement such sec-*
22 *tion shall become effective upon enactment.*

Calendar No. 343

94TH CONGRESS 1st Session | SENATE | REPORT No. 94-381

GOVERNMENT IN THE SUNSHINE ACT

SEPTEMBER 18 (legislative day, SEPTEMBER 12), 1975.—Ordered to be printed

Mr. CANNON, from the Committee on Rules and Administration and on behalf of the Committee on the Judiciary, submitted the following

REPORT

[To accompany S. 5]

The Committee on Rules and Administration, to which was referred title I of the bill (S. 5) to provide that meetings of Government agencies and of congressional committees shall be open to the public, and for other purposes, having considered the same, reports favorably thereon with an additional amendment, and recommends that the bill as further amended by the Committee on Rules and Administration do pass.

The Committee on the Judiciary, to which was referred section 202 of Title II of the bill (S. 5), has been unable to act thereon due to the press of other legislative business, but agrees to report the bill with the reservation of the right to file on the floor of the Senate proposed amendments to this legislation at a later date.

S. 5 would provide that, except under certain specified circumstances, all meetings of multiheaded Government agencies and of congressional committees would be open to the public.

This measure was reported by the Committee on Government Operations on July 31, 1975, with an amendment in the nature of a substitute. On August 1, 1975, by unanimous consent, the bill was referred to the Committee on Rules and Administration for consideration of title I only, with instructions to report back no later than September 15. This reporting date was subsequently extended to September 19.

Title I, which is the subject of this Committee's consideration, would—

(1) Amend the Legislative Reorganization Act of 1946 to open to the public most meetings of Senate standing, select, and special committees (including all subcommittees), as well as meetings of joint committees and conference committees of the Congress;

(2) Repeal the present rule Senate on the subject (paragraph 7(b) of Rule XXV); and

(3) Amend Rule XI of the Rules of the House of Representatives to open to the public most meetings of House standing, select, and special committees (including all subcommittees).

The Committee on Rules and Administration is reporting S. 5 with an additional amendment, the effect of which would be to strike Title I from the bill. While the Committee generally agrees with the concept of more openness in Government as expressed in S. 5, it believes that in respect to congressional committees such purpose would more properly be achieved by direct amendment of the Standing Rules of the Senate rather than by amendment of the Legislative Reorganization Act of 1946. Consequently the Committee is reporting Senate Resolution 9 with an amendment in the nature of a substitute for that purpose. (For details of that proposal see the report of the Committee on Rules and Administration to accompany S. Res. 9.)

The Committee on Rules and Administration has recommended that in respect to congressional committees the purposes of S. 5 be accomplished by direct amendment of the Standing Rules, rather than by amendment of the Legislative Reorganization Act of 1946, for the following reasons:

Section 5 of Article I of the Constitution provides that "Each House may determine the Rules of its Proceedings, * * *." In the Committee's judgment such a fundamental change in Senate procedure as further opening of committee meetings should be accomplished by simple resolution directly amending the Senate rules, thus obviating the necessity of participation by the House of Representatives or the President in a matter which is solely within the jurisdiction of the Senate itself.

The Legislative Reorganization Act of 1970 enacted certain provisions bearing on the procedure and organization of both Houses of Congress. In many instances that Act effected changes in the Standing Rules of the House of Representatives, while it left comparable or identical provisions relating to the Senate standing as provisions of public law, and not as comparable changes in the Standing Rules of the Senate. The Committee on Rules and Administration has undertaken a review of all such provisions of the Legislative Reorganization Acts (1946 and 1970) with the objective of ultimately incorporating all appropriate provisions into the Standing Rules themselves.

The Committee on Rules and Administration did not address itself to the matter of open meetings of joint committees of Congress, believing that subject should await experience gained under the new procedure in respect to standing committees, but by a vote of 7 to 1 it agreed to table Senate Resolution 12, which would have opened up conference committees. The vote to table Senate Resolution 12 was as follows:

YEAS—7	NAYS—1
Mr. Cannon	Mr. Hatfield
Mr. Pell [1]	
Mr. Scott	
Mr. Byrd	
Mr. Griffin	
Mr. Allen	
Mr. Williams [1]	

[1] Proxy.

It should be noted that since the Committee on Rules and Administration was directed by the Senate to confine its consideration only to Title I of S. 5, the Committee is thereby precluded from reporting the technical or conforming amendments in the other portions of S. 5 which would be required as a result of its recommended deletion of Title I. Thus, should the recommendation of the Committee on Rules and Administration be approved by the Senate, authority for making such necessary conforming amendments should be included within that approval.

Rollcall Vote on S. 5

On the motion by Mr. Robert C. Byrd that Title I of S. 5 be stricken and the remainder of the bill be reported favorably, the Committee voted as follows:

YEAS—7	NAYS—1
Mr. Cannon	
Mr. Hatfield	
Mr. Pell [1]	
Mr. Scott	
Mr. Byrd	
Mr. Griffin	
Mr. Allen	
Mr. Williams [1]	

[1] By proxy.

Mr. ROBERT C. BYRD. Mr. President, in view of the fact that the Senate today has acted on that portion of S. 5 which dealt with congressional procedures, I ask unanimous consent that the Government Operations Committee substitute, and the Rules Committee amendment thereto, both be agreed to, and as agreed to and amended, the substitute be considered as original text for the purpose of further amendment.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. PERCY. Mr. President, S. 5 as it now appears on the floor refers only to the executive branch. Provisions dealing with Congress were included in Senate Resolution 9, which has just been adopted by the Senate. S. 5 sets rules concerning the openness of agency meetings. S. 5 requires meetings between heads of multiheaded agencies to be open to the public. Meetings are defined as agency deliberations where at least a quorum of the agency's members meet to conduct or dispose of official agency business.

Meetings can be closed by the agency only by majority vote of all agency members and then only on 1 of 10 specified grounds.

Advance notice to the public of agency meetings is required as to time, place, and subject matter. If an agency closes any meeting, it must announce its meeting ahead of time, along with an explanation of its action, and make a verbatim record of the meeting. After the meeting, it must release to the public every major portion of the meeting which did not involve sensitive matters.

There are provisions in the bill to expedite procedures for closing meetings when an agency, using one of the exemptions in the bill, must close a majority of its meetings.

U.S. district courts are given the jurisdiction to enforce the requirements of the bill. Any person may bring an action prior to or within 60 days after the meeting to which the violation relates.

If the court finds against the agency the court may grant appropriate relief. Suit can be brought against an individual member of the agency as well as against the agency itself. The court is allowed to assess against any party the reasonable attorney fees and other litigation costs incurred by any party who substantially prevails in an action. Costs may be assessed against an individual agency member when the agency member has intentionally and repeatedly violated provisions of the bill.

The Justice Department has provided me an analysis of S. 5. The Justice Department believes that the public should have access to information regarding the decisionmaking process of the Federal Government and that a statute requiring agencies to open certain of their meetings to the public would be a legitimate and useful means of effectuating this policy. However, the Department does raise a number of concerns about the bill, many of them definitional and technical in nature. Given the lateness of the Justice Department's comments and the extensive nature of them, there has not been time for the committee to fully act upon them.

There is one provision of the bill which the Justice Department feels very strongly about. As the Department states:

> Perhaps the most objectionable subsection in S. 5 is 201(i) which permits costs to be assessed against individual agency members, rather than against the agency itself or the United States, when the plaintiff has "substantially prevailed," and the court finds that any agency member has "intentionally and repeatedly violated 201."

Justice argues that:

> These provisions are a breach of the doctrine that action taken by United States employees as part of their official duties does not subject them to personal responsibility.

I agree with the Justice Department arguments and would support an amendment to S. 5 to delete individual agency member liability.

The remaining part of S. 5 amends the provisions of the Administrative Procedure Act governing adjudication and formal, rulemaking by establishing a broad prohibition against ex-parte communications in such formal trial-type proceedings. The prohibition only applies to formal agency adjudication and forbids ex parte communications between interested persons outside the agency and agency decision-makers.

Mr. President, S. 5 is an attempt to get public awareness of agency proceedings, as Senate Resolution 9 attempts to do for Congress. I hope that the Senate will see the merits of this bill and swiftly approve it.

[From the Congressional Record—Senate, Nov. 6, 1975]

(S 19432–S 19447)

Government in the Sunshine Act

The Acting President pro tempore. Under the previous order, the Senate will now resume the consideration of the unfinished business, S. 5, which the clerk will state.

The legislative clerk read as follows:

The bill (S. 5) to provide that meetings of Government agencies and of congressional committees shall be open to the public, and for other purposes.

The Senate resumed the consideration of the bill.

The Acting President pro tempore. Time for debate on the bill is limited to 1 hour, to be equally divided and controlled by the majority and minority leaders or their designees, with 30 minutes on any amendment, debatable motion, appeal or point of order.

Who yields time?

Mr. Robert C. Byrd. Mr. President, I suggest the absence of a quorum. I ask unanimous consent that the time be charged against both sides on the bill.

The Acting President pro tempore. Without objection, it is so ordered, and the clerk will call the roll.

The second assistant legislative clerk proceeded to call the roll.

Mr. Mansfield. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The Presiding Officer (Mr. Leahy). Without objection, it is so ordered.

Mr. Mansfield. Mr. President, I assign to the Senator from Florida (Mr. Chiles) the time that has been assigned to the majority leader.

I suggest the absence of a quorum.

The Presiding Officer. On whose time?

Mr. Mansfield. On the bill, equally divided.

The Presiding Officer. The clerk will call the roll.

The second assistant legislative clerk proceeded to call the roll.

Mr. Chiles. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The Presiding Officer. Without objection, it is so ordered.

Mr. Chiles. Mr. President, today, we will take up S. 5, as amended by the Committee on Rules and Administration, which deleted the provisions of S. 5 that dealt with the Senate or with Congress.

S. 5, the Federal Government in the Sunshine Act, is based on the premise that the Government should conduct the people's business in public. Since I first introduced this legislation in August of 1972, a great deal of progress has been made toward opening up government on all levels.

Forty-eight States have enacted some type of open meeting provision. Now that Congress has taken the lead by opening its own doors,

I feel that we are in an excellent position to request that executive agencies follow suit.

S. 5 would open specific multimember Federal agency meetings to the public. This measure as it now appears is a very refined version—a product of many, many hours of study and hearings on State sunshine laws, Federal agency comments and input from the administrative conference, the American Bar Association and other interested groups. Two sets of hearings were held on S. 5.

A wide variety of witnesses testified about the very practical aspects of operating in the open, including representatives from the Federal Communications Commission, the Interstate Commerce Commission, and the Civil Aeronautics Board. The Government Operations Committee solicited and received comments and opinions on S. 5 from every Federal agency that would be affected by this legislation. These comments were most helpful in the final drafting on this legislation.

We also received a substantial amount of input from the American Bar Association, which after having set up a special committee to consider this legislation endorsed the concept of open Government along the lines defined by S. 5.

I believe that the timing of this legislation is particularly opportune amid the general clamor for regulatory reform. I think we all know of the increasing feeling in the United States among all citizens from the affluent businessman to the welfare recipient that Government has become too big, too unwieldly for the public to understand. A major step in the area of regulatory reform would be to let all of us watch the agency decisionmaking process in action to know what the considerations are and to see what these agencies actually do.

To quote David Cohen:

> Opponents of open Government talk constantly of the innumerable problems that would result from public meetings and full citizen access.

But these objections simply do not stand up against the overwhelmingly positive experience of legislative committees in Congress and around the country which have shown that openness works and rather than impeding business it promotes better discussion.

In Florida we found that everyone agrees with the basic concept of openness but they always find reasons to be against a specific provision of a specific bill or say this is a great idea that should apply to everyone else but not to us. I think that once you start exempting anyone everyone says "me too." The provisions of S. 5 are the product of very careful study of existing laws to see what works and what does not. We have taken into account the need for certain types of meetings to be closed and these exemptions are well outlined in the explanation of S. 5. But I think that to go further would be a mistake. Therefore, I hope that we will proceed to consider this measure as it is without special interest exemptions.

Mr. RIBICOFF. Mr. President, I fully support S. 5, "The Government in The Sunshine Act."

The Government Operations Committee unanimously reported this legislation after over 3 years of study. Senator Chiles deserves great credit for the active role he played in the committee's development of a sound and responsible bill.

The purpose of this bill, now cosponsored by 54 Senators, is to give the public a full opportunity to observe the way the Government con-

ducts the public's business without infringing upon the rights of individual citizens, and the ability of the Government, to function efficiently.

Since the Senate is considering separately title I of the bill, governing open committee meetings, I will address my remarks at this moment to the part of the legislation opening agency meetings to the public.

Section 201 applies to 47 agencies in the executive branch headed by 2 or more commissioners. It establishes the basic principle that meetings between the heads of these agencies should, except for certain specified reasons, be open to the public.

Section 202 establishes for the first time an across-the-board statutory prohibition against secret ex parte conversations between members of the public and the agency formally adjudicating a matter of interest to that person.

This legislation will do much to increase the public's faith in the integrity of Government. It will enable the public to better understand the decisions reached by Government agencies. It will better acquaint the public with the process by which agency decisions are reached.

Recent studies underscore the urgent need for enactment of S. 5. In September 1973, a Harris Survey conducted by the Subcommittee on Intergovernment Relations of the Government Operations Committee showed that confidence in the executive branch of the Federal Government had fallen from 41 percent in 1966 to 27 percent in 1972, and had sunk to a new low of 19 percent in 1973. According to testimony Mr. Harris provided the Government Operations Committee last year, only 36 percent of the people think that "most public officials today are dedicated to helping the country rather than being out for themselves".

Opening up the process to observation by the public should reassure the public about the honesty and integrity of most Government officials. It will remove any distrust the public has of the Government simply because agency actions are taken behind closed doors. In other cases, openness may help promote the quality of commission work for it will further encourage commissioners to prepare for meetings and to attend the meetings with regularity.

Open meetings will also mean the public debate cannot help but improve the problems administrators face, and the reasons for the decisions they take. This knowledge should in turn promote greater cooperation and compliance with public debate on the issues. Greater public debate cannot help but improve the decision-making process.

Finally, open meetings will give every member of the public equal access to information. No longer will some people have an inside track because they possess some special knowledge about an agency's action which other interested parties, or the public generally, lack.

As chairman of a committee which conducts all its markup sessions in public, I know from first hand experience that the fears some agency officials may have of this type of legislation are unjustified. Experience in the 49 States that have adopted open meeting laws confirm this also. Openness does not in fact hurt the quality of discussions or inhibit free and frank discussions. Discussion need not be less free or frank because the public is there to observe the discussion. The bill provides that where a closed session is necessary because of the sensitive nature of the information discussed, an agency will in fact be able to close the meeting.

A few agencies, such as the Federal Election Commission and the Commodity Futures Trading Commission, have adopted on their own a similar policy of openness. There is no reason why other agencies cannot do so also.

Section 202 of the bill extends the principle of openness to cases of formal agency adjudication. While agency decisions in formal cases of adjudication are only supposed to be made on the basis of the facts and arguments in the public record, there is always the danger that one side or the other will attempt secretly to influence the decision maker's actions without the other parties to the case, or the public, knowing. Such fears that agency decisions have been influenced behind closed doors by secret political pressures can only undermine public confidence.

Section 202 states for the first time in clear and unequivocal statutory language that such practices are prohibited.

For the first time it establishes a clear procedure for agencies to follow when ex parte communications do occur so that other parties and the public may know about such communication and have a chance to respond to them.

For the first time it declares that if a person knowingly engages in such illegal practices the agency may rule against him on the merits of the case.

In preparing this legislation the committee has consulted with a number of experts both in and outside the Government.

The American Bar Association has, among other groups, been very interested in this legislation. In August the house of delegates of the ABA supported the policy of opening Federal agency meetings to the public along the lines provided in section 201 of S. 5. Previously the House of Delegates endorsed wording very similar to the prohibition against ex parte communications contained in section 202.

This legislation will help bring together the people of this country and their Government. It will help reduce the public's feeling that their Government at present is all too remote and mysterious.

The legislation will be good for the agencies and good for the public.

I urge every Member of the Senate to fully support this important legislation.

Mr. CHILES. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. On whose time?

Mr. CHILES. The time to be equally divided.

The PRESIDING OFFICER. The clerk will call the roll.

The second assistant legislative clerk proceeded to call the roll.

Mr. ROTH. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. ROTH. First, Mr. President, I call attention to the fact that, through an oversight, the name of the junior Senator from Florida was inadvertently omitted from a list of cosponsors of amendment 968 to open conference committees to the public, which I had inserted in the Record yesterday. I want the Record clearly to reflect that the junior Senator from Florida has been a persuasive, dedicated, and outspoken advocate of open meetings of conference committees during his tenure in the Senate. It was through his efforts that the Conference Committee on the Standby Energy Authorities bill was thrown open

to the public even before the passage of amendment 968. The Record should show that the junior Senator from Florida (Mr. Stone) was a cosponsor of the move to establish a general rule to open conference committees to the public.

Mr. President, I am happy to associate myself closely with the remarks made today by the senior Senator from Florida (Mr. Chiles) on S. 5, the Government in the Sunshine Act. As an original principal sponsor of this legislation with Senator Chiles, I congratulate the senior Senator from Florida on the persistence and dedication with which he has pursued this matter. This is a part of an effort, which took a major step forward yesterday in vindicating the public's right to know about the public's business.

Mr. CHILES. Will the Senator yield?

Mr. ROTH. I am happy to yield.

Mr. CHILES. I say to the distinguished Senator from Delaware that I appreciate very much his kind remarks.

I also want to say that I appreciate his support. I think that our victory yesterday could not have happened without the support of the senior Senator from Delaware. I think the fact that the movement of reform, as certainly the movement toward openness, always was a bipartisan movement and cut across not only party lines, but cut across ideological lines, was one of the reasons that it did pass. Certainly, the Senator from Delaware was persuasive and added greatly to the support that we received. I thank him for his support on that and also for his support in being the principal cosponsor on S. 5.

Mr. ROTH. I thank the senior Senator from Florida for those kind remarks. I agree very strongly that the question of openness in Government is neither a partisan nor a philosophical matter. It is just a question of good form for democratic government.

As I was saying, this is not a gift from us to the public; it is, in my judgment, a public right. I first became concerned about excessive secrecy in Government as a freshman Member of the House in 1967, when I began to identify basic information on Federal domestic assistance programs. At that time, I was very shocked to learn that nowhere in the Government could we really even identify the number and kind of Federal assistance programs that were available, presumably to help the State and local governments, as well as schools and other authorities.

We made, at that time, a determined effort in my office—it took us something like 14 months—to identify roughly 1,100 different programs. It took us over 2 years to finally get the Federal Government to publish in one study each year the programs that are established to help the people back home.

I might relate just one story. The Assistant Secretary of HEW came over to my office to ask me why I wanted to know what all these programs were. I made the comment that it seemed to me that this is a right of the public back home. He told me the programs were changing so fast that they could not publish them.

I asked,

How could the school authorities, for example, plan under those circumstances?

He said,

Mr. Congressman, are you having any problems under any particular program?

I said:

Well, I am sure we are, but that is not what I am seeking. What I want is basic information.

That is when I first became dedicated to the idea of opening up government and I can think of no area where the public has a greater right to know than to have detailed information as to the programs that, presumably, were to help our local governmental authorities.

S. 5 will open to the public most meetings of multiheaded Government agencies, except where there are clearly compelling reasons for confidentiality. I think, in this respect, what we are trying to do today is comparable to what we did yesterday in adopting an open rule for Senate committees and conference committees. Now that we have reformed our own procedures, I think we are in a very strong position to press this legislation.

I was particularly pleased that the reform offered yesterday was finally unanimously adopted. For that reason, I think it bodes well for this legislation today.

S. 5 also prohibits ex parte contacts between agency employees and outside interests, which I think has great merit.

Mr. President, I believe that the Government in the Sunshine Act will increase contact between the citizen and the bureaucracy in Washington, increase the credibility and accountability of agency employees, and give the public the fullest possible access to the meetings of many Government agencies. I hope it will receive speedy contribution in the House as well.

The PRESIDING OFFICER. Who yields time?

Mr. CHILES. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. On whose time?

Mr. CHILES. The time to be equally divided.

The PRESIDING OFFICER. The clerk will call the roll.

The second assistant legislative clerk proceeded to call the roll.

Mr. ROBERT C. BYRD. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. JAVITS. Mr. President, I apologize to my colleagues for the delay, but I had a necessary phone call. It has been made now and I will not intrude any further.

AMENDMENT NO. 1043

Mr. JAVITS. Mr. President, I call up my amendment No. 1043 and ask that it be stated.

The PRESIDING OFFICER. The clerk will state the amendment.

The legislative clerk read as follows:

The Senator from New York (Mr. JAVITS) proposes an amendment numbered 1043.

The amendment is as follows:

On page 44, line 4, insert the following after the word, "Senate": *Provided*, That this section shall not apply to any agency that has as one of its principal functions the formulation and implementation of national monetary policy except to the extent that such agency meets to consider or dispose of matters relating to consumer protection legislation such as the Truth in Lending Act (15 U.S.C. 1601), the Fair Credit Reporting Act (15 U.S.C. 1681), the Fair Credit Billing Act (15 U.S.C. 1666), the Equal Credit Opportunity Act (15 U.S.C. 1691), and the Federal Trade Commission Improvement Act".

Mr. JAVITS. Mr. President, the time limit is 15 minutes on a side?

The PRESIDING OFFICER. The Senator is correct.

Mr. JAVITS. Mr. President, may I ask if there is any time allocated to the bill and whether that could be yielded, if necessary?

The PRESIDING OFFICER. There is time on the bill. There is time remaining, the managers can yield time if they desire.

Mr. JAVITS. I thank the Chair.

Mr. President, this amendment would take the Federal Reserve Board out of this bill, leaving only—subject to the bill—its responsibilities to consumer activities, and they are specified in the amendment, the Truth in Lending Act, the Fair Credit Reporting Act, the Fair Credit Billing Act, the Equal Credit Opportunity Act and the Federal Trade Commission's Improvement Act.

In those cases, the Federal Reserve Board exercises the kind of functions which are thought to be reached by this bill and, therefore, there is no reason for taking them out.

Mr. President, will the Chair inform me when I have used 8 minutes of my time?

The PRESIDING OFFICER. The Chair will inform the Senator.

Mr. JAVITS. Mr. President, I am a strong supporter of the bill and have been highly approving of the fine activities of Senator CHILES and Senator ROTH, both of whom are members of our committee. I am very proud of the bill coming out of the Committee on Government Operations, but the reason I have raised this subject, Mr. President, is because I have considerable doubt myself as to the desirability of doing what the bill would do, vis-a-vis the Federal Reserve.

Second, I have great respect for the Board itself and its chairman and they have felt so very strongly, as reflected by Arthur Burns himself—whom we all respect, as probably as fine a public servant who has served this country in this field—that we were making a grave mistake to bring the Fed into the purview of this act, aside from the consumer-related activities which are accepted by the amendment, that I felt in all fairness we ought to submit the case to the Senate. The only way it could be done effectively is by this amendment.

I disclosed my intention and my reasons both to Senator CHILES and to Senator ROTH, who will argue against the amendment with their customary vigor, undiminished by my purpose, but I think also they have a sense of respect for the fact that when the chairman of so important an agency as this one feels as strongly as he does we really have a duty to submit the matter to the Senate.

I shall do my utmost to show the arguments in favor of Chairman Burns' position. I shall vote with that position or I would not be submitting the amendment, but I understand the objectivity with which the Senate should address this particular question.

The second point that is important by way of preliminary is that a great effort has been made, Mr. President, in all fairness, to accommodate the Fed's views in this bill.

There are a number of special provisions which the managers will point out to the Senate, quite properly, that have been inserted in the bill in order to try to satisfy some of these problems which Chairman Burns raises. But it still leaves, in his judgment, so much that is a hazard that he feels that we should simply exclude the Fed, and that the Sunshine Act, as it is called based upon a very fine Florida example,

should not extend to the Federal Reserve. Not that it is some sacrosanct agency, above and beyond all others, but simply because it is counterproductive to the U.S. interest that there should be anything, of any kind or character, which might—and that is a very important word to emphasize—disclose the internal operations of the Federal Reserve Board insofar as its critical responsibilities relating to money management and the oversight of the banking system, insofar as it comes within its purview are concerned.

The scheme of the legislation is such as to exclude single-headed agencies, and they would include the Federal Aviation Agency, the Federal Energy Administrator, as well as all the major cabinet departments which are headed by single heads; and also to exclude those which are not under the Administrative Procedure Act but make policy, essentially, where that is their function. These would include, for example, the National Security Council and the President's Council of Economic Advisers.

The Fed, as we popularly call the Federal Reserve Board, might easily come under that category of having solely policymaking functions were it not for precisely the kind of agency administrative functions relating to consumers which I expressly excluded from the amendment.

The heart of the proposition put before us by Chairman Arthur Burns is the following, and I would like to quote from a memorandum to me on this subject, speaking of the board.

> It is inconceivable to us that congressional requests, for example, for agency comments on proposed legislation, requests for experienced assistance in stated congressional efforts, or requests for responses to congressional inquiries, are intended to be known by the public before transmission to the Congress.

At another point in his memorandum to me, he really gives the essence of the Federal Reserve's position. He says:

> With few exceptions each of the Board's regularly scheduled meetings—

And there are about 150 a year as this is a board that meets very, very frequently, an average of three times a week, winter, summer, spring, and fall—

> is involved with matters, the sensitivity and intricacy of which if exposed to public discussion would lead to misunderstanding, misinterpretation and disruptive and harmful speculation. Examples include deliberative processes in monetary policy formulation; receipt, transmission and evaluation of national and international market information; and incident to the formulation of bank regulatory policy, discussion of confidential appraisals and sensitive judgments relating to member bank and/or bank holding company operations.

Remembering that the Federal Reserve is organized with 12 member banks in the great financial centers of the country.

The major areas in which it is felt by the chairman that these dangers are exposed are as follows:

One, the definition of the word "meeting." That is found at page 44 of the bill. It is page 44, lines 7 to 11. It defines a meeting as being the following:

> For purposes of this section, a meeting means the deliberations of at least a number of individual agency members required to take action on behalf of the agency where such deliberations concern the joint conduct or disposition of official agency business.

The PRESIDING OFFICER. The Senator's 8 minutes have expired.

Mr. JAVITS. I yield myself 2 additional minutes.

That means that a quorum of the Commission would, even if it met informally under this very, very broad definition, qualify as a meeting.

He considers that much too broad for the frequency and the closeness of deliberations of these seven members of the Board.

Then the point of a verbatim transcript which is required, using that very broad definition of a meeting, even for such a meeting, what the Fed might call a consultation, et cetera, the danger of leakage of that transcript and the inhibitions of what the chairman claims is the very frank exchange of members' tentative views and impressions and those of the contributory staff. If they came out, he feels it would be extremely dangerous and irresponsible to the situation of the country.

I have already referred to the point about legislative proposals, presentations, testimony and positions respecting the attitude to be taken toward given legislation in the Congress.

Finally, the oversight responsibility of the Federal Reserve Board for the Federal Reserve System, involving as it does, the economy of our whole country.

The last point is that all of the matters which are exempted—as I said, the committee tried to meet many of the views of Chairman Burns—may have to be justified in court because there is a very complete court review. There the difficulty, which is pointed out by Chairman Burns, and which I think is a very important point, is when he goes into court, and I quote from page 53, lines 3 and 4. "The burden is on the defendant to sustain his action" of maintaining secrecy.

Chairman Burns points out that in such a situation the burden to go forward, as the lawyers says, the burden of proof, is on the defendant to defend his action rather than on the plaintiff to prove his case. Chairman Burns feels that notwithstanding the fact that documents may be examined in camera, it will be impossible in the give and take, and the tensions, of a court trial to avoid revelations affecting the Fed which are highly inimical to the Fed and could be inimical to the banking system of the country and of the world because the Fed is our central banker.

Chairman Burns points out that it is unique in the world that a central bank should be subject to this kind of regulation which was never intended for it. Of course, the basis of it is that there are millions of decisions in business and in finance. Countless speculators are constantly seeking to find out what the Fed has in mind about increasing or reducing the money supply, interest rates, regulation of banks in terms of their regulations of credit and their emissions of credit rediscount rates and so on, of such critical importance to our country and to its economy, and to that of the world, that we have to, in this case, give preference to the confidentiality of these operations rather than preference, as I prefer and as the sponsors of the bill preferred, to openness in every humanly possible way. In this specific case, for these specific reasons, that should not be the rule, and the Fed should therefore be exempt.

One-half minute more.

The Fed should therefore be exempt insofar as its operations other than the consumer operations, which could be carried on by any agency or concern.

Mr. President, I think it is my respect for the unbelievably vindicated judgment over so many years of the chairman of the Federal Reserve Board which brings me here with this amendment. I believe it fair to say, and they will contradict me if I am wrong, that it is the respect for the same qualities which have induced Senator Chiles, who is the principal author, and Senator Roth to try to adjust the bill to meet many of these points. Chairman Burns feels we still have not met them. In this rather delicate balance, I must say that the reasons Chairman Burns gives for deciding a very close issue in favor of the board's view seem to me to be persuasive.

For that reason, Mr. President, I hope the Senate will vote this exemption subject to the conditions incorporated in the amendment. I reserve the remainder of my time.

The PRESIDING OFFICER. The Senator from Florida.

Mr. CHILES. Mr. President, we reluctantly oppose the amendment as set forth by the distinguished senior Senator from New York. The senior Senator from New York is correct that he has been an advocate and a key sponsor of the provisions for opening up the meetings not only of the Congress but also of the executive agencies.

His counsel and his work in this regard in the Committee on Government Operations certainly were positive. I think he has presented the argument very fairly on the proposition for the amendment of the Federal Reserve System. I also have the greatest respect for the institution of the Federal Reserve System, and for its chairman, Arthur Burns. I think he has done an outstanding job, and I think he is an outstanding American; and I am sure that the distinguished senior Senator from Delaware (Mr. ROTH) has the same opinion.

Because of our high esteem and our high regard for Dr. Burns, we attempted to make sure that we would listen long and hard to any comments that the Federal Reserve had about any possible problems in regard to the sensitive nature of their work that the banks would have in regard to the act. In trying to do that, I feel that we have adequately taken care of all of the reasonable and legitimate problems that they have raised.

The amendment now before us would exempt all the activities of the Federal Reserve Board except its consumer protection activities, and we think that would be a step backward for the bill. A number of the provisions already in the bill assure that the Federal Reserve Board and other agencies covered by the amendment would be able to continue to operate with efficiency and discretion. A complete exemption, however, in my judgment would be unjustified.

S. 5 now contains the following provisions to meet the objections raised by the Federal Reserve Board:

FINANCIAL SPECULATION

First. Exemption 7 in section 201(b) provides that an agency such as the Federal Reserve Board may close meetings in order to avoid premature disclosure of information which could either lead to serious financial speculation, or seriously endanger the stability of a financial institution.

BANK EXAMINATION REPORTS

Second. Exemption 8 allows an agency to close meetings dealing with bank examinations, operating, or condition reports.

SENSITIVE FINANCIAL INFORMATION

Third. Exemption 6 allows an agency to close a meeting where necessary to protect sensitive trade secrets, or commercial or financial information.

SENSITIVE INFORMATION ABOUT A MEETING

Fourth. A provision was added to 201(b) so that information about a closed meeting can be withheld for the same reasons that the meeting itself could be closed. For example, any information about the subject matter of a scheduled meeting need not be announced if it falls within the exemption in section 201(b).

SERIES OF MEETINGS

Fifth. If the agency meets for more than 1 day on the same particular matter, it can vote once to close all the meetings for the next 30 days on that particular subject. Thus, several Federal Reserve Board meetings stretching over a number of days on a particular problem would in effect be treated as a single meeting.

A number of provisions applicable to the Federal Reserve Board were added to the bill at the committee markup on June 18.

PROCEDURES

Sixth. Paragraph 201(c)(3) gives such agencies as the Federal Reserve Board added flexibility in complying with the procedural requirements of the act's provisions.

Under this provision the Federal Reserve Board could simply adopt general regulations prescribing which types of meetings must be closed. In the case of any meeting which falls within these provisions, the agency need only provide notice of the date, place, and subject matter at the earliest practicable opportunity. Notice need not be given any fixed number of days in advance of the meeting.

The second, and only other step, the agency need take would be to confirm by vote at the start of the meeting itself that the meeting should be in fact closed and release a copy of such vote to the public.

None of the other procedural provisions in subsections (c) and (d) relating to notice or the like would apply. A transcript or electronic recording of the meeting would be kept so that a record of the meeting could eventually be made available to the public if public access would no longer lead to financial speculation, or otherwise disclose confidential information.

TRANSCRIPTS

Seventh. An amendment to section 201(e) prevents an agency from having to edit every word of a transcript or of a tape of a closed meeting. The discussion of an item on the agenda could be withheld from the public if any substantial part of it involved confidential matters. Word-by-word editing would not be necessary. A formal vote of the agency whether to disclose a record of the meeting would not be necessary.

The effect of these provisions will be to let the Board close any meeting it really has to close. Furthermore, the Board will be able to

follow special expedited procedures to close its meetings. As a result it need only announce its meetings at the earliest practical opportunity, but not necessarily a week in advance, and then confirm at the start of the meeting that the meeting must be closed.

The bill, however, would still require the Board to keep a transcript or electronic recording of its meetings, and to release such a record when the matter is no longer sensitive. The proposed amendment would chiefly have the result of exempting the Federal Reserve Board from this additional provision. There is no justification for so doing.

Many of the meetings the Board may close will consider matters that can subsequently be made public. For example, after a Board takes a decision on interest rates and announces it to the public, there may be no longer any need for secrecy. If the Board is exempted from the entire section, it will not have to keep a record of the meeting and the public will be unnecessarily denied access to much information about the Board and its thinking. Or a meeting which the Board thought would involve sensitive matters may turn out not to be the case. Without a transcript of the record the public would be denied access to a meeting which need not be closed for any reason.

The experience of the Federal Reserve Board's Open Market Committee indicates that the Board will often be able to release transcripts of its meetings. That committee meets in secret to make decisions about the Nation's money supply. Seven of its 12 members are the 7 Governors of the Federal Reserve Board. The committee decided in March that it could release minutes of its meetings 45 days after the meeting instead of 90 days after the meeting as had previously been the case. The committee concluded that such disclosure after 45 days would not lead to dangerous speculation or interfere with the committee's functions. The Board might similarly find it was possible to release transcripts of its closed meeting after a centain length of time.

The issue here is not whether the Federal Reserve Board will be forced to release to the public sensitive matters which if known could cause financial speculation or the like. The bill provides that as long as there is such a possibility, the Board may keep the record of its meetings confidential.

Those supporting this amendment may argue, however, that the transcript requirement may inhibit free and frank discussion. This is the same argument many other agencies opposing the open-meetings requirements of S. 5 have made. If the Senate were to provide an exemption on these grounds to the Federal Reserve Board, many other agencies would ask why an exemption could not be made for them on exactly the same grounds.

The history of open meeting legislation in the States and in Congress is that such legislation does not in fact inhibit free and frank discussion.

Mr. President, in citing these comments. I think we have tried to set forth for the Record every step that we have taken to try to accommodate every reasonable problem that the Board has been able to raise as to how this legislation might hinder them in regard to any sensitive matters they have to deal with. In spite of that. and in spite of the many amendments we have adopted, we find that Dr. Burns is still not satisfied.

I have to think that it boils down to the general feeling that Dr. Burns has that because of the very nature of the Federal Reserve Sys-

tem, to be included in such a bill as this somehow casts a reflection on the Federal Reserve System. In fact, in a letter which Dr. Burns sent to the chairman of the Committee on Government Operations, the Senator from Connecticut (Mr. Ribicoff) on June 17, I think we find the real reason that he now wants to be exempted. He says in that letter:

> The mere thought that an anti-corruption bill need apply to the Federal Reserve would cast doubt on the integrity of our Nation's central bank and would undermine confidence in the dollar and the future of our economy.

I ask unanimous consent that the full text of the latter be printed in the Record at the conclusion of my remarks.

The PRESIDING OFFICER. Without objection, it is so ordered.

(See exhibit 1).

Mr. CHILES. Mr. President, this is my feeling as to the real reason why we find the continued request for exemption, and I do disagree with this. I do take issue with it. I do not take issue with any of the other valid reasons that have been raised, but I think the time has come when no agency of the people should be exempted, just written out, because of the fact that it is supposed to be sacrosanct or someone believes that there is historical significance or some reason that it should be exempted, regardless of the way that the work of the agency has been carried out; and I have nothing but praise for the way the work of the Federal Reserve System has been carried out. But it would be a mistake to make an overall exemption for the Federal Reserve System. It would greatly weaken S. 5. For that reason I must oppose the amendment.

EXHIBIT I

CHAIRMAN OF THE BOARD OF GOVERNORS,
FEDERAL RESERVE SYSTEM,
Washington, D.C., June 17, 1975.

Hon. ABRAHAM RIBICOFF,
Chairman, Committee on Government Operations,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: On May 12 the Subcommittee on Federal Spending Practices, Efficiency and Open Government voted to report to the full Government Operations Committee S. 5, the "Government in the Sunshine Act." Title II of this bill, designated Committee Print No. 2, generally requires that meetings of Federal agencies headed by more than one person be open to the public. After a careful consideration of the provisions of Title II, I have come to the conclusion that its enactment would seriously interfere with, perhaps even frustrate, achievement of the Federal Reserve's statutory functions. The Board's principal responsibilities, I am convinced, could not be met if this bill were enacted.

The problems that would be created for the Board by S. 5 stem from the Federal Reserve's role as the Nation's central bank and monetary authority. Effective exercise of the responsibilities assigned to the Federal Reserve by the Congress is essential to the strength and vitality of the U.S. economy. These responsibilities include: (1) maintaining the soundness of the national currency; (2) providing for the expansion of money and credit supplies that are needed to promote economic growth, full use of human and capital resources, a stable general price level, and equilibrium in the balance of payments; and (3) assuring the soundness of the commercial banking system, preserving order in domestic and international financial markets, and promoting developments in financial markets that contribute to an efficient use of resources.

In discharging these heavy responsibilities the Board meets regularly to discuss conditions in the domestic economy and in international markets, and to consider the effects of monetary policy actions in these areas. These discussions inevitably involve highly sensitive materials relating to businesses, financial institutions, and foreign central banks and governments.

For example, the Board must at all times be informed of financial difficulties faced by individual banks or other institutions. This requires access to information which, if it became public, might injure the reputation or financial position

of some businesses. Again, actions by the Board in the conduct of monetary policy often require coordination with the Executive Branch and with foreign central banks on matters of great sensitivity. Public disclosure of such information could be a source of needless embarrassment to other governments as well as our own.

The functions of monetary policy cannot be performed effectively in an open forum, as is evidenced by the fact that there is no precedent among the world's central banks for operation under constraints such as would be imposed by S. 5.

The bill appears to have two aims, neither of which has any relevance to a central bank. One aim, growing out of the evoluation of this legislation at the local and State level is to provide access for the press and public to meetings where decisions are to be made on contracting for expenditure of public funds. In this regard, it is an anti-corruption proposal. The mere thought that an anti-corruption bill need apply to the Federal Reserve would cast doubt on the integrity of our Nation's central bank and would undermine confidence in the dollar and the future of our economy.

The second aim of the legislation appears to be to improve decision-making by exposing the deliberative process in agencies headed by more than one individual. Open meetings may be healthy for the business of a county board of supervisors, a local board of education, or even for certain Federal regulatory agencies. But such governmental functions are not analogous to the workings of a central banking agency such as the Board of Governors whose deliberations frequently involve highly sensitive financial and economic information. It would be just as logical to require open meetings of the President's cabinet, or meetings of the Secretary of State with his top aides, or of the Secretary of the Treasury with foreign finance ministers. Fortunately, the bill does not reach this absurd result. By including the Federal Reserve within the definition of an agency, however, the bill seems to assume that the functions of the Board are similar to the administrative tasks of regulatory agencies charged with, say, setting interstate freight rates or work safety standards. This ignores the unique role of a central bank in a nation's economy and could do serious, perhaps irreparable, damage to our financial system.

The Subcommittee's bill, it is true, does allow for exemptions which would permit many Board meetings to be closed. But it seems totally inconsistent first to include the Nation's central bank within the scope of the bill's coverage and then to proceed by narrow, individual exemptions to permit various meetings—but far from all—to be closed. I would submit that no public interest is served by such an exercise; in fact, the closing of many meetings under a public access statute could well create questions in the minds of some members of the public as to the motives of the Board of Governors, even though we were proceeding meticulously within the bounds of the law.

Moreover, the closed meeting procedures themselves present an almost insuperable administrative hurdle. Briefly, these procedures (described more fully in the enclosed memorandum) require that a separate vote be taken each time a meeting or portion of a meeting is to be closed. Even preliminary meetings require an official vote for closure. A record of such votes must be made public within one day. The subject matter of all meetings with limited exceptions, whether open or closed, must be announced at least one week in advance. A full written explanation, with certain exceptions, must be issued as to why any meeting is to be closed. Prospective attendees must be identified and listed, together with their affiliations. A transcript or recording must be made of every closed meeting and retained by the agency for at least two years. Such transcripts or recordings must also be furnished to any person requesting them. Any portion of such recordings or transcripts that is determined by an agency to be exempt from public disclosure apparently requires a recorded vote evidencing such determination.

In my judgment, the complexity of these procedural requirements is totally incompatible with the effective accomplishment of the Board's responsibilities which often require quick and decisive action. In sum, I see no alternative to a complete exclusion from the bill's provisions for the Federal Reserve's central banking and bank regulatory functions. These include the formulation and implementation of monetary policy, discussions and decisions relating to its role as lender of last resort, bank and bank holding company supervision, internal administrative and budgetary decisions necessary to carry out these functions (including the Board's oversight responsibilities with respect to the operations of the Federal Reserve Banks), and related legislative matters.

It may, of course, be claimed that certain of the Board's responsibilities in the area of consumer protection—Truth in Lending, Fair Credit Billing, Equal Credit Opportunity, unfair trade practices, and the like—could come under the ambit of the legislation without invoking the kind of adverse consequences I have outlined for the central banking functions. My mind is open on this question, and the Committee may wish to consider whether the consumer functions might be appropriately included.

I hope that these comments will be helpful to you and the Committee in the further consideration of this legislation.

Sincerely yours,

ARTHUR F. BURNS.

Mr. ROTH. Mr. President, will the Senator yield?

Mr. CHILES. I yield.

Mr. ROTH. I join him in expressing appreciation for the fine work of the Chairman of the Federal Reserve. We all have great respect for the splendid job this public servant does for our Nation.

There is one area in the present language that perhaps could be clarified without significantly changing the intent.

I refer to page 46, exempting opening a meeting if it would lead to serious financial speculation. The word "serious" somewhat bothers me. It might be a little clearer. I think I understand what the intent of the draftsman is. But I would propose to the Senator from Florida that we might substitute "significant" as a better word for the word "serious". In paragraph (A) in line 16, I would say "significantly endanger", and in paragraph (B) in line 19 I would say again "significantly frustrate". It seems to me this is a little clearer than the word "serious."

Mr. CHILES. I have no objection to that change. It might be that we should wait until we have disposed of this amendment before we seek that modification. But I certainly have no objection.

Mr. ROTH. I will raise it later then.

The PRESIDING OFFICER. Who yields time?

Mr. JAVITS. Mr. President, what do I have? Do I have 4 minutes?

The PRESIDING OFFICER. Three minutes.

Mr. JAVITS. I yield myself 2 minutes.

Mr. President, the major point which is made by the Senator from Florida respecting what has been discussed, significant or serious financial speculation, as we may ultimately put it, misses the major point that is raised by Chairman Burns, because it is clear that the part of the section which was not referred to by the Senator, not wittingly or because he is trying to mislead us in any way, but simply because it is not part of his argument but of mine, comes in the latter part of that particular section which says:

This paragraph shall not apply in any instance where the agency has already disclosed to the public the content or nature of its proposed action. . . .

I point out that the Fed claims that it does. It will say it is considering possible change in the money market situation, to buy or sell, Federal securities. Therefore, the exemption which is granted is not nearly as tight as advertised, because this is their practice.

The second thing is about keeping an exact record. In the first place, that is pretty murky in the way it is set forth in the bill, but I am sure we can clarify that, as I will with the colloquy after we have disposed of the amendment.

But the important point on that is that the Fed now does keep minutes and at a later date, 45 days, actually dicloses to the public all the considerations which have gone into the matter.

The PRESIDING OFFICER. The Senator's time has expired.

Mr. CHILES. If the Senator needs additional time, I yield additional time.

Mr. JAVITS. The Senator is very kind.

Mr. CHILES. I say to the first point he has made—if we can clear this up in colloquy, I wish to do so—certainly it would not be the intent in any way that the provision that said unless they had otherwise made known that that would not be the general thing that they were thinking about raising interest, it would have to be the substance of something that they had generally made known, and it would not be the general thing that would open them up to that.

I think it would clearly be and if we wish to make that any clearer, we can certainly make that clearer, if the colloquy does not suffice, but I think it would, that we are not talking about a general thing in this regard. We are talking about that they make the substance of something.

Mr. JAVITS. Using the remainder of my time, Mr. President, I yield myself the remaining minute. I am confident that we can, after this amendment is disposed of, work out whatever we need to work out that is agreed upon between the Senators managing the bill and myself in colloquy, et cetera. That still does not go to the main point of the loopholes that are presented by the record in litigation in which the burden of proof is on the defendant, to wit, the Federal Reserve Board. As to this issue of a disclosure of content or intent—the word intent especially—of its proposed action, the feelings of the Board are such that the element involved here puts the United States and its economy and that of the world at such hazard that it is not necessary to risk in an agency which has stood as far as honesty is concerned impeccable in the eyes of Americans for many years.

That is the summation of the argument.

Mr. President, if our time has expired, I suggest the absence of a quorum.

Mr. TOWER. Mr. President, has all time expired?

Mr. JAVITS. I think Senator Chiles will yield the Senator some time.

The PRESIDING OFFICER. One minute remains to the Senator from Florida.

Mr. TOWER. Mr. President, will he yield to me?

Mr. CHILES. I am delighted.

Mr. TOWER. Mr. President, I wish to read into the Record some pertinent testimony by Dr. Burns before the Committee on Banking, Housing and Urban Affairs last Tuesday in response to the question that I asked him:

Dr. BURNS. Well, I must say to you that there's no piece of legislation that the Congress is considering that has caused me greater concern than the Sunshine Act. I wish I had had the opportunity to testify on that bill. I was never accorded the opportunity. There is no central bank in the world that functions under the kinds of restrictions that that act specifies. I think that the authors of that act had in mind probably an agency such as the Interstate Commerce Commission dealing with freight rates and there's a case for raising them or lowering them, and offhand I see no difficulty at all in discussing a problem of that sort in open hearing. But we at the Federal Reserve Board deal with the most sensitive issues of financial policy. We regulate banks. We have dealings with central banks around the country and to discuss our dealings with other central banks, some of which are in difficulty and come to us for assistance. I think would cause endless embarrassment to our government, to our country.

I think the fact that the Federal Reserve is being put under an umbrella of this type would suggest to people abroad that the Congress lacks confidence in

its central bank and I don't think that would help our country at this juncture of history.

Now it's perfectly true that there are certain exemptions that the act specifies so we could have closed meetings and yet a transcript would have to be kept and under the Public Information Act what was discussed might have to be made available very shortly to the general public. Now, I think, as you know, we at the Federal Reserve, while we're accused of being a secretive organization, make all of our decisions known to the public but after a certain lapse of time.

The PRESIDING OFFICER (Mr. Tunney). All time on the amendment has expired.

Mr. TOWER. Mr. President, I ask unanimous consent that I may proceed for an additional 3 minutes.

Mr. CHILES. I yield the Senator 3 minutes on time on the bill.

Mr. TOWER. I thank my friend.

The PRESIDING OFFICER. The Senator is recognized for 3 additional minutes.

Mr. TOWER. I thank my friend from Florida—

Some decisions, most of them in fact, are made available promptly, but some are postponed. I think it's a very dangerous piece of legislation and I hope that Congress will deliberate hard before subjecting the Federal Reserve or, for that matter, I'm not here to argue anyone else's case, but I'm a citizen of this country as well as chairman of the Federal Reserve, and I don't see how you can subject the Securities and Exchange Commission to the Government Sunshine Act. It could cause endless financial trouble.

Now, the Congress obviously is seeking to improve the welfare of the country, but how legislation of this sort, if financial agencies dealing with highly sensitive matters are brought under the act—how that could improve the welfare of the country I don't begin to see.

In all honesty, I don't see how we in the Federal Reserve could function under this legislation. We'd have a choice really between living under the law and taking great chances with this country's problems and future, or going underground and making our decisions outside of the board room and thereby breaking the law, circumventing the law.

Now I'm not going to do—I'm certainly not going to do the latter and I hope that you will not put me and my colleagues on the Federal Reserve in the position where we have to injure this country, and that is what the Government Sunshine Act will do. Now my language is plain but I'm answering your question, Senator.

Mr. President, I think that the testimony of Chairman Burns speaks for itself. Here is a man, who is a dedicated public servant, an honest man, and one whom I think has always been candid with Congress when asked to appear before us before our committees. Therefore, his views on this matter should be given very great weight.

The PRESIDING OFFICER. All time on the amendment has expired.

Mr. CHILES. I yield myself 3 minutes on the bill.

Mr. President, I want to answer briefly the comments of the distinguished senior Senator from Texas, or the comments, as read, by Dr. Arthur Burns.

First, I am concerned that Dr. Burns would say that he has not been allowed the right to testify. We solicited agency comments many times. We sought and had several hearings on the bill. At no time has Dr. Burns evidenced to the committee or to this Senator that he wanted the right to testify. He certainly would have been accorded that right at any time, had he indicated that he desired the right to testify.

As to the comments that have been raised, the distinguished Senator from Texas was not here when we read into the Record all the steps we had taken to take care of any problem, any legitimate problem, that the Federal Reserve Board raised and how they would operate. In dealing with banks, they are completely exempted from the act. In dealing with international monetary policy, they are completely exempted from the act.

We have allowed them to set up a general exemption so that they will not have to close every meeting, to adopt general rules to do it. We allow them to close in one meeting up to 30 days. We have taken, step by step, everything that has been raised by the Federal Reserve Board or its counsel.

In regard to the letter to the Banking Committee, Senator Proxmire has said that he cannot be in the Chamber at this time, but he has given me the right to say that he would oppose the amendment that would exempt the Federal Reserve Board.

Mr. President, I yield 3 minutes on the bill to the distinguished Senator from Connecticut.

The PRESIDING OFFICER (Mr. Talmadge). The Senator from Connecticut is recognized for 3 minutes.

Mr. WEICKER. Mr. President, I rise to oppose this amendment.

The arguments presented are no different from those that could be presented on behalf of any of the hundreds of Federal agencies. Either we are going to have a bill that brings all Government out into the open or we are not.

I have been through this exemption exercise once before, in the consumer protection bill, when we exempted labor and the electronic broadcast media, and so on down the line.

That is the reason why we have no credibility as a Congress. We enunciate these great, sweeping, broad principles to the American people and then start to nibble at them and carve out our own exemption, whether it is for an executive agency or for our political party or our State or ourselves. All of a sudden, the people get the feeling that we are legislating for everybody else but not for ourselves.

I completely oppose this amendment. I think the doings of the Federal Reserve Board are as much a part of the people's business as anything else.

For a long time, I have felt that too much has been going on behind closed doors, too much going on in Arthur Burns' mind. This business of making Arthur Burns and the Federal Reserve Board looking sacrosanct is great, until we get into difficulty, and then we start to yell for scalps. Even though we are focusing on the economy and give added impetus to the Federal Reserve Board, that is fine, but I will not go along, because of these times, with an exemption for that Board. I think the economy of this country is very much the business of the American people.

Insofar as encouraging free and open discussion is concerned, openness in our Government has not inhibited free and frank discussion. In fact, I believe that if we had had freer and franker discussion by a variety of economists, we would not have gotten into the difficulties we are in now. So that argument does not hold.

So far as sensitive material and the rest are concerned, that is provided for in the bill. This happens to be one man who does not like to share his powers with the American people, just as, for a long time, Senators did not want to share their powers with the American people. It is not our Government; it is not Arthur Burns' Government. It is the people's Government. We serve them. Can you imagine having somebody serve you and your not knowing what they are doing? We serve; Arthur Burns serves. We are not the ones telling other people what to do.

Mr. JAVITS. Mr. President, will the Senator yield me a few minutes?

Mr. CHILES. I yield the Senator 3 minutes.

The PRESIDING OFFICER. The Senator from New York is recognized for 3 minutes.

Mr. JAVITS. Mr. President, I speak again only because of the argument made by Senator WEICKER, whom I respect tremendously; but, unhappily, I must say that the elements of inconsistency in his argument are very glaring to me.

He speaks of an action that brings all of government out into the open. I think those are his exact words.

I am for the sunshine bill. I have said many times. I am strongly for it. It is not because what the National Security Council does or what the Joint Chiefs of Staff do about the security of the United States, or what Government departments do, headed by a Secretary, often with as much power as the Federal Reserve Board. Why? Because we do not want to run our democracy down the drain by any kind of principle which is unbending and has no recognition of the factors which are influential and important in respect of the operation of a country.

I will yield to no one in terms of my own liberalism for disclosure, and so forth, so far as the American people are concerned. Perhaps that is why I am proposing this amendment, because I recognize that there are circumstances under which that general rule, with which I agree thoroughly, would be self-defeating and would break down the very things we are trying to assert.

So, without in any way differing with my colleagues as to the principles which are basically involved, I have tried to deal with the specific exception which represents the operations of the Federal Reserve Board.

Finally, I do not think this Board is suffering from any lack of criticism or scrutiny. It is constantly being raked over the coals by our beloved friend WRIGHT PATMAN. For a long time, he was the chairman of the committee that could do it. It is done constantly in banking committees of the House and the Senate and in the country.

Arthur Burns is a popular witness before many committees, and it is precisely because of his frankness and openness in terms of the situation in the country.

So I beg my colleagues, for whom I have enormous regard, to think of that particular aspect of the matter and what I am attempting to do in respect to this amendment; that it does not represent just a tribute to a great public servant—to wit, Arthur Burns—but that there really are substantive issues of great delicacy and great jeopardy involved so far as the economy of the country and of the world is concerned, to bring the Central Bank under a reform piece of legislation eminently justified by the broad bulk of everything that is done in Government, but which in my judgment, and certainly in that of Arthur Burns, could be counterproductive and regressive in respect to the particular agency involved.

For all those reasons, Mr. President, I hope very much the Senate will decide to exempt partially—and that is what this amendment would do—the Federal Reserve Board.

Mr. WEICKER. Mr. President, will the Senator yield me 2 minutes on the bill?

Mr. CHILES. I yield.

Mr. WEICKER. I thank the distinguished Senator from Florida.

I respond in this way: The Senator from Connecticut has many faults, but inconsistency is not one of them.

Insofar as the National Security Agency and the various intelligence and law enforcement agencies are concerned, I have long called for oversight and for bringing them into the act, if you will, under the direction of the American people. If I had my "druthers," I would view this legislation as rather conservative, as only one step. I would sweep everything under it.

I might add that we create the sacred cows. There is nothing in the Constitution that gives sacred cow status to NSA, the Federal Reserve Board, or anyone else, and they should not have it.

I do not want to rake Arthur Burns over the coals. I would like to know what is going on so we never get to the point where he has to be raked over the coals, any more than anybody enjoys raking the CIA or the NSA over the coals. If we all have input at the outset, there will not be need for any raking over the coals. We could all share the glories and the failures of any particular agency or any action of Government.

I can understand the arguments of the distinguished Senator from New York, and I respect his point of view; but one thing that the Senator from Connecticut wants to say is that he is not inconsistent. I would apply this standard to all the agencies of Government.

The PRESIDING OFFICER (Mr. Nunn). The time of the Senator has expired.

The question is on agreeing to the amendment.

Mr. CHILES. Mr. President, I ask for the yeas and nays.

The PRESIDING OFFICER (Mr. Nunn). Is there a sufficient second? There is not a sufficient second.

Mr. JAVITS. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. ROTH. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. JAVITS. Mr. President, I demand the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second? There is a sufficient second.

The yeas and nays were ordered.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk called the roll.

Mr. ROBERT C. BYRD. I announce that the Senator from Indiana (Mr. BAYH), the Senator from Idaho (Mr. CHURCH), and the Senator and the Senator from Illinois (Mr. PERCY) are necessarily absent.

I further announce that the Senator from Indiana (Mr. HARTKE) is absent on official business.

I also announce that the Senator from Michigan (Mr. HART) is absent because of illness.

Mr. GRIFFIN. I announce that the Senator from Utah (Mr. GARN) and the Senator from Illinois (Mr. PERCY) are necesarily absent.

I further announce that, if present and voting, the Senator from Utah (Mr. GARN) would vote "nay."

The result was announced—yeas 36, nays 57, as follows:

[Rollcall Vote No. 471 Leg.]

YEAS—36

Baker	Glenn	Pell
Bellmon	Griffin	Scott, Hugh
Bentsen	Hansen	Sparkman
Brock	Helms	Stennis
Brooke	Javits	Stevenson
Buckley	Johnston	Taft
Byrd, Harry F., Jr.	Long	Talmadge
Case	Mathias	Thurmond
Curtis	McGee	Tower
Dole	McIntyre	Williams
Eastland	Morgan	Young
Fong	Pearson	

NAYS—57

Abourezk	Gravel	Metcalf
Allen	Hart, Gary	Mondale
Bartlett	Haskell	Montoya
Beall	Hatfield	Moss
Biden	Hathaway	Muskie
Bumpers	Hollings	Nelson
Burdick	Hruska	Nunn
Byrd, Robert C.	Huddleston	Packwood
Cannon	Humphrey	Pastore
Chiles	Inouye	Proxmire
Clark	Jackson	Randolph
Cranston	Kennedy	Ribicoff
Culver	Laxalt	Roth
Domenici	Leahy	Schweiker
Durkin	Magnuson	Scott, William L.
Eagleton	Mansfield	Stafford
Fannin	McClellan	Stone
Ford	McClure	Tunney
Goldwater	McGovern	Weicker

NOT VOTING—7

Bayh	Hart, Philip A.	Symington
Church	Hartke	
Garn	Percy	

So Mr. Javits' amendment was rejected.

Mr. JAVITS. Mr. President, there is one thing in the bill which needs straightening out and it will take us just a minute or two to do it. That relates, Mr. President, to the provision for keeping an exact transcript which appears at page 50, line 20, to page 51, line 2, of the bill, which relates to the fact that it is left unclear as to whether, notwithstanding the fact that a significant portion of the transcript may relate to matters which ought to be kept confidential, the transcript has nonetheless to be complete.

I would like, therefore, to have this colloquy with the manager of the bill.

The PRESIDING OFFICER. Who is yielding time on this?

Mr. CHILES. Mr. President, I yield such time as we might need.

Mr. JAVITS. One minute.

The PRESIDING OFFICER. The Senate will be in order. Senators will suspend until the Senate is in order.

Mr. CHILES. Mr. President, I think perhaps the Senate might like to know that at the conclusion of this colloquy, and an amendment that we will adopt by the Senator from Massachusetts, and a corrective

amendment by the Senator from Delaware, I think we will be going to final passage in the next few minutes.

The PRESIDING OFFICER. The Senator will proceed.

Mr. JAVITS. Mr. President, subsection 201(e) of S. 5 deals with agency preparation, maintenance, and release of verbatim transcripts of closed meetings. My reading of subsection 201(e) indicates that an agency that closes a meeting because of the anticipated discussion of matters covered by the exemptions of subsection 201(b)(1)–(10) must prepare a complete transcript or recording of such closed meetings (except a meeting closed pursuant to 201(b)(9)); thereafter, agencies are required to make promptly available to the public the complete transcript of discussion where no significant portion of that discussion contains exempt subject matter.

I want to make it clear that the bill does not require an agency to release the complete transcript of a properly closed hearing merely because a less than significant portion of the closed discussion was of an exempt nature. Yet, this may be required by the ambiguous language contained in the text of the bill. Rather than nullify the apparent congressional intent in allowing an agency to close a meeting so as to protect sensitive material against public disclosure, I urge that it be made clear that subsection 201(e) requires only that the nonsensitive portion of a closed meeting be released in its entirety, allowing the agency to withhold from public disclosure the admittedly less than significant portion of a transcript relating to sensitive subject matter protected by the act.

Mr. CHILES. Mr. President, I concur with my colleague, the distinguished senior Senator from New York (Mr. JAVITS) that the public benefit results obviously intended by the transcript requirements of subsection 201(e) do not logically call for release by an agency of the complete recording of a closed meeting, but should be limited to disclosure of the total portion of such discussion not covered by one of the bill's exemptions.

I might further add that an agency will not have to review continually the sensitivity of the transcripts of its board meeting. A periodic review at reasonable intervals is all that is needed.

Mr. JAVITS. I thank my colleague very much.

Mr. President, I yield the floor.

Mr. KENNEDY. Mr. President, I call up my amendment No. 1027.

The PRESIDING OFFICER. The clerk will state the amendment.

The assistant legislative clerk proceeded to read the amendment.

Mr. KENNEDY. Mr. President, I ask unanimous consent that further reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

On page 56, strike out line 20 through line 25.
On page 57, line 1, strike out "(c)" and insert in lieu thereof "(b)".
On page 57, line 13, strike out "(d)" and insert in lieu thereof "(c)".

The PRESIDING OFFICER. The Senate will please come to order. The Senator will suspend. The Senate is not in order.

The Senator from Massachusetts.

Mr. KENNEDY. Mr. President, I have had an opportunity to talk this over with the manager and the ranking minority member.

The purpose of this amendment is to conform the pending legislation with the Administrative Procedure Act. It conforms in an area

where a contract can be made by a hearing administrator in a Federal regulatory agency.

Essentially this amendment would conform the pending legislation with the Administrative Procedure Act.

I think it would be a worthwhile amendment facilitating further oversight in terms of the drafting of this bill, since the facts that have been included conform very closely with the APA. I believe it to be consistent with the thrust and the purpose of the legislation.

Mr. President, the Administrative Procedure Act establishes the general principles and requirements which govern procedures in almost all Federal agencies. The APA, enacted in 1946, has stood substantially unchanged since then except for the enactment and subsequent amendment of the Freedom of Information Act.

The APA took little interest and notice of the substantive issues involving ex parte communications. The legislative reports accompanying the original bill show that the Congress was interested in achieving an internal separation of functions for agencies serving both prosecutorial and judicial functions. Section 5(c)'s limited prohibition against ex parte communications in formal adjudications reflected one approach by Congress to achieving that objective of internal separation.

The issue of improper and detrimental ex parte communications gained public attention in the 1950s when several notorious cases came to light including one involving an attempt by Presidential assistant Sherman Adams to influence a decision of the Federal Trade Commission.

Fulfilling a campaign promise to remedy these kinds of incidents and to free agency and regulatory proceedings from the improper pressure of special interests, President John Kennedy proposed legislation in 1961 which would have required each agency to adopt regulations governing ex parte communications along certain statutory guidelines. The statutory requirements would assure, among other things, that ex parte communications in all formal proceedings be prohibited.

Public interest spurred several congressional investigations of ex parte influences on administrative agencies, and a handful of bills were introduced to deal with various facets of the problem.

Although there was considerable discussion of various administrative reforms during the 1960s, no legislation in this area was enacted. In the meantime, in response to President Kennedy's initiative, the 1962 temporary Administrative Conference proposed a set of general principles to guide the formulation of agency rules in this area. The conference supported the concept of individual agency rulemaking to deal with the ex parte problem, and various agencies adopted rules reflecting those proposals.

In 1963 the American Bar Association's Administrative Law Section began a review of the Administrative Procedure Act, including its ex parte provisions. The Senate Subcommittee on Administrative Practice and Procedure conducted a number of hearings in the mid-1960s on proposals to revise and reform the APA, but the only change made in the act involved enactment of the Freedom of Information Act in 1966 and subsequently its codification.

After several years of study by a special ABA committee, the American Bar Association adopted 12 resolutions in 1970. Those reso-

lutions proposed a number of specific changes in the APA. One of those resolutions, No. 4, related to ex parte communications. The various recommendations were translated into legislative proposals and considered by the Administrative Conference of the United States.

Earlier this session I introduced a series of bills, S. 796 through S. 800, reflecting the efforts of the ABA and the administrative conference. One of these bills, S. 799, contains a provision to implement the ABA recommendation on ex parte communications. Section 202 of title II of S. 5 is based on section 3 of my bill.

Last summer, when the Government Operations Committee favorably reported S. 5, unanimous consent was obtained to provide the Judiciary Committee an opportunity to examine section 202 of the bill. Although the Judiciary Committee did not have the chance to report formally on this matter before the bill was returned to the floor September 15, the Subcommittee on Administrative Practice and Procedure requested agency reports and had an opportunity to study this section in some detail.

My amendment, Mr. President, was developed out of the Administrative Practice Subcommittee's consideration of section 202, although the amendment has not formally been considered by the subcommittee. The amendment is intended to restore to the Administrative Procedure Act a provision which would be deleted by section 202(b) of S. 5. The amendment was proposed initially by Mr. Richard Berg, Executive Secretary of the Administrative Conference and, I understand, it is acceptable to the managers of the bill.

My amendment deletes section 202(b), thereby leaving intact in the APA section 554(d)'s present prohibition against a presiding employee's consulting "a person or party on a fact in issue unless on notice and opportunity for all parties to participate." As I understand, section 202(b) was intended as simply a conforming change in the APA, in view of the more comprehensive prohibition against ex parte contacts added by section 202(a). However, the deleted material in section 554(d) of the APA covers certain communications not prohibited by section 202(a)—that is, the new provision added to the APA by section 202(a) does not wholly overlap the deleted APA provision, leaving a gap in the two areas: These involving ex parte consultations, first, between the presiding officer and noninterested persons outside the agency, and second, between the presiding officer and persons within the agency.

The Attorney General's manual on the Administrative Procedure Act, issued in 1947, clearly explained the purpose of section 554(d) (then section 5(c)) of the APA as being intended—

> to assure that hearings be conducted by hearing officers who have not received or obtained factual information outside the record and who are neither supervised nor directed in the conduct of the hearings by agency officials engaged in the performance of investigative or prosecuting functions.

On the language proposed to be deleted by S. 5 as reported, the Attorney General's manual states:

> the officer is prohibited from obtaining or receiving evidentiary or factual information bearing on the issues unless, after notice, all parties are permitted to participate. This would apply as well to expert testimony; the officer may not informally obtain evidentiary material from such experts either during or after the hearings, any more than he may from other witnesses.

As to agency insiders, "permitting the hearing officer to engage with appropriate agency personnel in an analytical discussion of the record is thoroughly consistent with the purposes of the act." But the officer is not—and should not be—able to obtain material facts or evidence from other employees without notice to the parties.

My amendment would thus leave present section 554(d) of the APA without change, carrying forward the useful objectives reflected in the initial enactment of this section.

I should observe, Mr. President, that section 202 of S. 5 deals only with a very narrow area of improper communications received by Government decisionmakers. The efforts of ITT to achieve a favorable settlement of its antitrust case illustrate the pervasive problem of influence directed toward discretionary prosecutorial activities. The classic Sangamon Valley case, involving the FCC, illustrate that informal rulemaking proceedings are also susceptible to ex parte influence. These areas are, however, left untouched by the provisions of S. 5.

Most of the instances of improper ex parte communications not covered by the Administrative Procedure Act—presently or as proposed to be amended by S. 5—would be subject to the logging and disclosure requirements of S. 1289, the Open Communications Act which I introduced earlier this year. That bill would require high-level agency officials to make publicly available summaries of communications with persons outside the agency relating to proceedings or other substantive policy matters considered by the agency. The Administrative Practice and Procedure Subcommittee has begun hearings next week. This legislation would serve as an important corollary to the present ex parte prohibitions contained in the APA and S. 5.

Mr. President, I hope that my amendment to S. 5 will be adopted by the Senate.

It is actually a technical amendment, and I hope the Members will be willing to accept it.

Mr. CHILES. We certainly are willing to accept it.

I thank the distinguished Senator from Massachusetts for calling our attention to this. This is the reason that the bill was referred to his Committee on Judiciary and the Administrative Conference has told us this needs to be done and we are delighted the Senator called it to our attention.

We will accept it.

Mr. KENNEDY. Mr. President, I am prepared to vote on the amendment.

The PRESIDING OFFICER. Is all time yielded back?

Mr. KENNEDY. I yield back the remainder of my time.

Mr. CHILES. I yield back the remainder of my time.

The PRESIDING OFFICER. The question is on agreeing to the amendment of the Senator from Massachusetts.

The amendment was agreed to.

Mr. ROTH. Mr. President, I send an amendment to the desk and ask its immediate consideration.

The PRESIDING OFFICER. The amendment will be stated.

The assistant legislative clerk proceeded to read the amendment.

Mr. ROTH. Mr. President. I ask unanimous consent that further reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

On page 46, line 14, strike the word "serious" and insert in lieu thereof the word "significant." At line 16, strike the word "seriously" and insert in lieu thereof the word "significantly."

On line 19, strike the word "seriously" and insert in lieu thereof the word "significantly."

Mr. ROTH. Mr. President, I made reference to this proposed change in language earlier. What I am proposing is that on page 46, with respect to the exemptions for the Federal Reserve, that we change the word "serious" to "significant."

I think the word "significant" says more precisely what we are trying to cover, that the Federal Reserve should not be required to have open meetings when there is danger of significant financial speculation.

I think that is clearer than "serious financial speculation."

There are three different places in this paragraph where I propose this change of wording from seriously to significantly.

I have discussed this with the manager of the bill and I think it is satisfactory.

Mr. CHILES. If the Senator will yield, I think that "significantly" expresses the intent of the committee when we were trying to use "serious." I think maybe "significant" is a better word of art.

We will certainly accept it.

Mr. JAVITS. Will the Senator yield?

Mr. ROTH. Yes.

Mr. JAVITS. I think that we should appreciate the precisional language of the Senator.

Mr. ROTH. I yield back the remainder of my time.

Mr. CHILES. I yield back the remainder of my time.

The PRESIDING OFFICER. All time has been yielded back. The question is on agreeing to the amendment of the Senator from Delaware.

The amendment was agreed to.

Mr. CHILES. Third reading.

The PRESIDING OFFICER. The bill is open to further amendment. If there be no further amendment to be proposed, the question is on the engrossment and third reading of the bill.

The bill was ordered to be engrossed for a third reading and was read the third time.

Mr. CHILES. Mr. President, I ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second?

There is a sufficient second.

The yeas and nays were ordered.

Mr. RIBICOFF. Mr. President, I want to take this opportunity to commend the Senator from Florida and the Senator from Delaware for their outstanding efforts on behalf of this legislation, S. 5 and S. Res. 9. They have been leaders and have worked very hard in the Government Operations Committee to make this possible.

This legislation has great significance for the people of this Nation to understand what we are doing in Congress and what the executive branch is also trying to do.

The staffs of the entire committees also deserve praise for their hard work on behalf of this legislation.

Mr. JAVITS. Will the Senator yield?

Mr. RIBICOFF. I am pleased to yield to the Senator.

Mr. JAVITS. Mr. President, having proposed the most controversial of the amendments in respect to the bill, I join the chairman in complimenting them for their very fine work, both managing Senators.

Mr. CHILES. Mr. President, I thank the distinguished chairman, also the distinguished Senator from New York, for their kind remarks. The chairman at all times gave us his support, in support of the committee, and that was very helpful to us.

I join with the chairman in thanking the staff who worked so long and so hard on the bill.

Mr. ROTH. Mr. President, I would just like to add my special thanks to the chairman of the Government Operations Committee. I know of no chairman who is fairer and more cooperative with all members of the staff than the chairman of the Government Operations Committee.

I would like to add my word of thanks to the Government Operations staff and the members of the staff of the senior Senator from Florida as well as my own. They have worked hard to get this legislation through and, again, I believe we are taking a step forward. I also wnat to express appreciation for the significant work on this bill done by the junior senator from Connecticut and his staff.

Mr. PERCY. Mr. President. S. 5 provides a specific exemption from openness provisions for meetings that relate to the agency's own internal personnel rules and practices. It also provides specific exemption for meetings relating to the purchase of real property by an agency.

The Federal Reserve has raised the question as to whether these exemptions also apply to the 12 Federal Reserve banks around the country over which the Board of Governors of the Federal Reserve here in Washington exercises oversight. The Board here in Washington discusses personnel at the Federal Reserve Banks around the country, sets salaries, decides on site acquisition and building plans, and discusses other internal practices of the Banks.

I want to make sure that these discussions by the Federal Reserve here in Washington about the personnel of the Federal Reserve banks around the country would also be exempt as would other agencies with a similar structure. Senator Chiles. is that your understanding?

Mr. CHILES. The Senator is correct. The regional Federal Reserve Banks would be treated as part of the one overall organization headed by the Federal Reserve Board bank in Washington. The same is true for other agencies with a similar regional structure.

Mr. PERCY. The Federal Reserve is concerned that the bill contains no provision that would enable the Board to deliberate and formulate legislative proposals, presentations, testimony and positions without exposing them to the public prior to their deliverance to Congress.

Under the Board's present procedures, any statement of Board position relating to legislative matters is subjected to Board meeting discussion. The Board questions whether congressional requests for agency comments on proposed legislation, requests for experienced assistance in stated congressional efforts, or requests for responses to congressional inquiries are intended to be known by the public before transmission to the Congress.

Senator Chiles, would such discussions be exempt from the openness provisions of the bill?

Mr. CHILES. If a Congressman or a committee requests in confidence for the views of any agency on any legislative matter, or if it refers to testimony any agency could close a meeting discussing the matter. The whole content of the agency to provide information to a Congressman or committee in confidence could be frustrated if the discussion was public. Section 201(b)(7)(B) would permit an agency to close its meeting in this instance where it must respond in confidence to an inquiry from Congress or prepare in confidence testimony to be given later before a committee.

Mr. WEICKER. Mr. President, after a 3-year period of hearings, discussion, and careful scrutiny, the Senate finally has a Government in the Sunshine Act, on the floor for its consideration. S. 5 provides that meetings of Government agencies be open in order to allow the public to have the highest degree of knowledge regarding governmental decisonmaking processes.

The first sunshine legislation was introduced in August 1972. Unhappily, that date also closely coincides with the first reports of the Watergate abuses. Those abuses clearly illustrate the need for an open airing of governmental activities related to decisionmaking. S. 5, if enacted earlier might not have provided a remedy to the litany of abuses uncovered during this period, but it could have encouraged an open atmosphere for the conduct of the Government's business in public.

When governmental activities are held in secret behind closed doors, we have seen where the affairs of the Federal Government have suffered. But, even more important, when the public is kept in the dark as to agency activities and the essential decisions that affect their daily lives, the effects could have serious consequences.

We have heard all the arguments against the bill from the commissions and agencies whose operations this bill would bring to light. The points they raise run the gamut from: the bill would unnecessarily inhibit the efficient conduct of agency business to beliefs that this bill would not allow a free and open exchange of ideas and candid opinions. What they seem to forget is the overriding responsibility to allow the public, in order for them to participate in the decisionmaking process, to have an unfettered access to information on how their Government operates.

Many of these agency heads do not give the public enough credit to be able to view their proceedings and make competent judgments as to how they perform their duties. The bill's expressed intent to implement open meetings not only will foster increased public awareness of how their Government functions, but it also has a dual purpose of increasing the public's confidence in governmental affairs.

S. 5 provides an opportunity to begin mending some of our systematic ills by opening the doors of Federal agencies and removing the cloak of secrecy which has too long been a part of the decisionmaking process.

We only have to look to the States for examples of how open meeting laws have been accepted and regarded as successful steps to opening agency meetings. It must be viewed as a sad commentary when State laws on open government date back as far as 1950 and open meetings legislation is now on the statute books of 49 States. Yet, the Congress has not acted until now to consider open Government legislation that would apply to itself and the executive agencies. The

Congress should have taken the States' example long ago and enacted legislation of its own.

My own State of Connecticut has had an open meeting law relating to State agencies since 1971. A recent act passed by the State legislature and effective October 1, 1975, would extend the open meeting provisions to the legislative and judicial branches.

The risks are too great to allow the closed door practices of Federal agencies to continue as they have in the past. Recent revelations of abuses have only served to increase the public's distrust of Government activities. To let the trend continue unabated will destroy any relationship between the public and Government agencies that is necessary for a democratic nation to survive. S. 5 provides a mechanism to restore that trust and rebuild the confidence that is necessary for any Government to function properly.

Mr. CLARK. Mr. President, surely nothing is more important today than the restoration of public confidence in Government. In recent years that confidence has sunk to an alltime low. As pollster Lou Harris testified in the hearing held last year:

> At this point in our history, the people are roundly fed up with what they feel is incompetence, inefficiency, corruption, lack of real public interest, and just plain lack of decency in the governing circle of this country.

The legislation before us today, S. 5, The Government in the Sunshine Act, would go far to help restore public confidence in Government. It is a logical extension of legislation passed by Congress over the past decade to open the Government's decisionmaking process to public scrutiny. It will help increase the public's faith in the integrity of Government, enable the people to better understand the decisions reached by the Government and better acquaint the citizenry with the process by which agency decisions are reached.

The basic principle underlying this bill is that the Government should conduct the public's business in public. As John Gardner, chairman of Common Cause, has said:

> Secrecy is fatal to accountability. Citizens cannot hold government officials accountable if they do not know what government officials are doing. All of the great instruments of accountability that the citizen must depend on—Congress, the courts, the electoral process, the press—may be rendered impotent if the information crucial to their functions is withheld.

It is natural that the public should be more distrustful of Government conducted in secret: Secrecy necessarily breeds suspicion. And this suspicion arises in large part simply because meetings are closed, rather than from any specific evidence that improper or illegal activities are taking place behind the locked doors. Regardless of what the public actually learns about the Government, the fact that this bill would open meetings formerly closed should in itself remove an important source of public distrust of Government.

Second, the bill before us today would greatly enhance the public's understanding of the decisions reached by the Government. The Freedom of Information Act enables the public to review many of the documents on which Government decisions are based. These constitute a record of what has already transpired. Yet, up to now the public has not had full opportunity to observe how or why Government officials make the important policy decisions which they do. All too often the meetings at which such decisions are made are closed to the public.

Interested persons must content themselves with elementary minutes, or background papers only tangentially related to the official agenda. Formal statements in support of agency actions are frequently too brief, or too general, to fully explain an agency's reasoning, or the compromises that were made. As a result, the public may not understand the reasons an agency has acted in a certain way, or even what exactly it has decided to do. By requiring important decisions to be made openly, this bill will create better public understanding of agency decisions.

Third, openness will significantly increase cooperation between the public and Government agencies, and promote compliance with agency decisions. It will enhance the public's comprehension of the difficult choices agencies must often make, and improve appreciation of the problems they face. Moreover, openness will better demonstrate what facts and policy considerations an agency finds important in reaching its decision, and what alternatives were considered and rejected.

Finally, as all elements of the public gain an equal opportunity to learn about the issues and problems confronting agencies, wider and more informed public debate of the agency's policies becomes possible. Increased public interest and discussion cannot help but improve the decisionmaking process.

One of the leading scholars on administrative law, Prof. Kenneth Culp Davis of the University of Chicago Law School, is a strong supporter of the Government in the Sunshine bill. According to Professor Davis:

> Open meetings would at first cause consternation and opposition. But gradually open meetings would be accepted. Making more of the realities known to the public would facilitate criticism, and the principal result would be to improve the quality of what is done. Furthermore, the democratic influence would be stronger. The relation between agencies on the one side and media and pressure groups on the other side would be improved, because misunderstanding resulting from partial information, as distinguished from full information, would be reduced.

Open meeting laws have been widely accepted and implemented by the States. Forty-nine States now have open meeting laws, and 35 States have constitutional provisions relating to open Government. In 1950, only one State had such a law. Many of these laws have been enacted just within the past few years. Nine new laws were passed during 1972–73. In 1974, 10 States strengthened existing legislation. Moreover, no open meeting law has been repealed, though a number have been strengthened. Several States have recently amended their constitutions to make their open government provisions more comprehensive.

Forty-nine States require an open-meeting policy for State-level agencies. Forty-four States provide for open meetings of county and city level nonlegislative agencies, as well as city councils and county boards. Currently, State legislatures in 35 States open committee deliberations to the public. In contrast, only 17 States opened committee meetings to the public as a matter of course in 1972.

Thanks, in large part, to the work of Lawton Chiles, the State of Florida has the most comprehensive open meetings law in the country. The Florida law opens to the public all discussions and deliberations of government where "official acts are to be taken." Since its passage in 1967, Florida's "Sunshine Law" has been well received by

the judiciary. The courts have neither significantly limited the broad scope of the law, nor riddled it with exceptions. Indeed, the judicial acceptance of this strong open government law has fostered the development of similar laws in other States.

Just as the open meetings provision will expose the conduct and disposition of official government business to public scrutiny, so a second provision of S. 5 prohibiting ex parte contracts will insure openness in the way the Government decides formal adjudication and rulemaking proceedings.

Ex parte contacts made secretly between one party to a proceeding and an agency official prevent other interested parties from countering the arguments presented. They may also make it impossible for the public to understand why an agency decided the case as it did. Such contacts make it difficult for Congress to exercise effective oversight of the practices and policies of regulatory agencies. In short, ex parte contacts are totally inconsistent with the democratic principle of open government. Section 202 of the bill provides clear notice to all concerned that such contacts are not only illegal, but may actually result in the agency finding on the merits against a party who knowingly violates the provision.

Mr. President, I was one of the original sponsors of the predecessor to this bill, S. 260 in the 93d Congress. The legislation now before this body is a carefully drafted measure, reflecting the advice of many legal experts both from within and without the Government, the comments of 43 Federal agencies, and suggestions by members of Federal agencies, Congress, and the public. It is specially designed to insure that the Government will be able to open its activities to the public without imposing unnecessary procedural burdens or interfering with the Government's efficiency or effectiveness. The exemptions provided in the bill are reasonable and sufficiently flexible that none of the agencies covered should find compliance unduly burdensome.

I strongly urge my colleagues to support this bill. Open government is essential to accountability, and accountability is the very essence of democracy. The public has every right to know how the Government is conducting its business.

Woodrow Wilson put it best in 1884—and it is just as true today:

> Light is the only thing that can sweeten our political atmosphere—light thrown upon every detail of administration in the departments—light blazed full upon every feature of legislation—light that can penetrate every recess or corner in which any intrigue might hide; light that will open to view the innermost chambers of Government.

Mr. CHILES. Mr. President, I ask unanimous consent that a summary of this bill be printed at the conclusion of my remarks and prior to passage of the bill.

The PRESIDING OFFICER. Without objection, it is so ordered.

There being no objection, the summary was ordered to be printed in the Record, as follows:

TITLE II—AGENCY PROCEDURES

SECTION 201—OPEN AGENCY MEETINGS

Section 201. (a) Provides that all meetings between the heads of multi-headed Federal agencies shall be open to the public. An agency is defined as in the Administrative Procedure Act, but only those agencies are covered which are headed by two or more individual members. A majority of such members must

also be appointed by the President, with the advice and consent of the Senate. The Justice Department has tentatively estimated that 47 agencies would be covered by this meeting. Because of the unique nominating and confirmation process governing appointments to the Federal Elections Commission, this agency is included by specific reference.

A meeting is defined as the deliberations of the number of agency members needed to take action on behalf of the agency where such deliberations concern the joint conduct or disposition of official agency business.

SEC. 201. (b) Establishes the 10 grounds under which an agency may vote to close meetings or a portion of a meeting despite the requirements of subsection (a). Closing meetings on these grounds is permissive, not mandatory. In addition to closing a meeting, an agency may, on the same grounds, withhold information about the meeting otherwise required by the section to be disclosed.

The exemptions are as follows:

(1) Allows a meeting to be closed if information to be presented has been lawfully required to be kept secret by an Executive order in the interests of national defense or foreign policy. Where such is the case, other law would make the closing of such a meeting mandatory rather than permissive. The wording follows exactly one of the amendments to the Freedom of Information Act enacted last year.

(2) Provides that portions of a meeting may be closed if the meeting is concerned with the agency's own internal personnel rules and practices.

(3) Allows a portion of a meeting to be closed if the nature of information presented at the meeting constitutes an unwarranted invasion of personal privacy. For instance, a meeting might be closed if the committee was concerned with discussing the competence of the president of a company regulated by that agency.

(4) Exempts meetings which might involve accusing any individual or corporation of a crime or formally censuring such a person. An agency might close under this exemption a meeting discussing whether to investigate the possibility that a person had submitted fraudulent documents to the agency.

(5) Allows a meeting to be closed if it would disclose information from investigatory records compiled for either civil or criminal law enforcement purposes. However, the meeting could be closed only to the extent that such disclosure of records would interfere with enforcement proceedings, deprive a person of a right to a fair trial or an impartial adjudication, constitute an unwarranted invasion of personal privacy, disclose the identity of an informer, disclose confidential information furnished only by a confidential source in the course of a criminal investigation, disclose investigative techniques and procedures, or endanger the life or physical safety of law enforcement personnel. This exemption is the same as one of the amendments to the Freedom of Information Act enacted last year.

(6) Exempts meetings disclosing trade secrets of financial or commercial information where the agency has no legal right to get such information or where disclosure would substantially injure a person's competitive position. This covers not only trade secrets, but such additional information as a company's financial status.

(7) Exempts certain specified types of discussions where premature disclosure of the agency's thinking could destroy the ability of the agency to carry out its responsibilities. The exemption only applies to instances where the agency has not already announced it is considering taking the action under discussion. For example, if an agency has issued a proposed rule, further discussion of the proposed rule could not be closed under this provision. Furthermore, to be applicable, the discussion must also meet one of two additional specified conditions.

Subparagraph (1) makes the provision applicable to the SEC, the FDIC, the Federal Reserve Board, and similar agencies that regulate currencies, securities, commodities or financial institutions. Where premature discussion of issues by these agencies would lead to serious financial speculation, or endanger the stability of any institution, the meeting may be closed. A Federal Reserve Board discussion of the precarious financial state of a member bank could be closed under this provision. An SEC discussion whether to order trading of a certain stock suspended would also be included.

Subparagraph (2) applies to actions by any agency where premature disclosure of the agency's plans would seriously frustrate the agency's implementation of the agency's action. An example would include disclosure that the agency is considering an embargo on the import of certain goods where public disclosure of the

agency's actions would lead to a rush of imports and defeat the purpose of the proposed regulation.

Subparagraph (3) applies to agency purchase of real estate. Public disclosure of the agency's interest in certain property would drive up the price of land.

(8) Applies to bank examination reports and other similar audits prepared by such banking agencies as the FDIC, the Federal Reserve Board, and the Federal Home Loan Bank Board. This provision is identical to one in the Freedom of Information Act.

(9) Relates to discussions concerning the initiation, conduct, or disposition of an adjudication governed by Section 554 of Title 5, U.S.C. or another similar statute. This provision exempts discussion of any particular case being litigated before the agency pursuant to the rules of the Administrative Procedure Act governing adjudication. For example, review by the FTC of the hearing record in a case accusing a particular company of false and misleading advertising would be exempted. Such discussions are more quasi-judicial than quasi-legislative in nature and hence are less conducive to a discussion in the open. Decisions in such cases must be based solely on the record of the case. Section 202 of the Act, on ex parte discussion, will assure that the Commissioners do not have any unannounced meetings with other persons about the merits of such adjudication. The exemption also applies to agency consideration of litigation in federal or state court. This would, for example, cover agency discussion of appropriate legal strategy in such a case.

(10) Allows the closing of a meeting if information presented at the meeting would disclose matters which must be kept confidential because of another statute specifically applying to particular types of information. For example, an individual's income tax returns would be covered by this exemption. This paragraph applies only to statutes which mandate that particular information be kept confidential, and not to such laws as the Freedom of Information Act, where the matter is left to the discretion of the agency.

Section 201(c). Establishes the procedures an agency must follow if it wishes to close a meeting.

Paragraph (1) provides that a meeting may be closed, or information withheld, only by a majority vote of the entire membership of the agency. Generally a separate vote must be taken on each meeting the agency wishes to close. A single vote can be taken, however, to close a series of meetings, where all the meetings will be held within a 30 day period, and involve the same issues.

Each vote must be recorded, and must be made public by the agency one day after the vote. No proxies are allowed.

A person whose interests may be directly affected by the meeting may request that the agency close portions of a meeting on the grounds of personal privacy, that the meeting will involve him in criminal charges, or that it involves information derived from an investigative file. The agency must then vote on whether to close the meeting if one or more commissioners requests such a vote.

Paragraph (2) requires an agency to make public a full written explanation of its decision to close any meeting. A list of persons expected to attend the closed meeting and their affiliation must also be made public.

Paragraph (3) establishes special procedures for agencies that may have to close a majority of their meeting for the reasons outlined in Paragraphs 6, 7A, 8, or 9. These paragraphs will be especially relevant to those agencies which have special need for confidentiality because they deal extensively in sensitive financial matters or formal adjudication. Where an agency must close a majority of its meetings for such reasons, as will perhaps be so in the case of the SEC, the NLRB, or the Federal Reserve Board, the agency will be able to adopt a general regulation spelling out the meetings that will have to be closed. The agency will then be allowed to follow an expedited procedure to close each particular meeting and to announce such meeting to the public.

Section 201(d). Requires advance public notice of all agency meetings.

Paragraph (1) requires the agency in most cases to publicly announce the date, place, subject matter of a meeting and whether the meeting is open or closed, at least one week prior to the meeting. If the members vote that agency business requires a meeting at an earlier date, the required public notice must be provided at the earliest practicable date. If the subject matter of a meeting, or open status of a meeting, must be changed afer the initial announcement, the agency may vote to do this also.

Section 201(e). Requires that a complete transcript or electronic recording be made of each meeting the agency votes to close, unless it is a meeting con-

cerned solely with cases under adjudication. The agency must promptly provide to the public the portions of each transcript or electronic recording which does not disclose information that would justify closing a meeting pursuant to subsection (b). Copies of such transcripts, or transcriptions of the tapes, must be provided any person at the actual cost of duplication or transcription. The transcripts or tapes must be maintained by the agency for two years, or for one year after the conclusion of the proceeding to which they relate, whichever is later.

Section 201(f). Requires each agency to promulgate regulations implementing the requirements of subsections (a) through (e) within 180 days after enactment of the Act. If an agency does not promulgate regulations within 180 days, any person may bring a proceeding in the U.S. District Court for the District of Columbia to compel issuance of the regulations. Any person is given the right to challenge in the D.C. Court of Appeals the adequacy of the regulations issued under this subsection.

Section 201(g). Gives the U.S. district courts jurisdiction to enforce the requirements of subsections (a) through (e) by declaratory judgment, injunctive relief, or other appropriate relief. Any person may bring an action in the district where he resides or has his business, or where the agency is headquartered, within 60 days after the holding of the meeting in question. If there was no public announcement of a meeting until after it was held, the suit must then be brought within 60 days after such public announcement of the meeting. Before instituting a suit, the plaintiff is required to notify the agency and give the agency a reasonable period of time, not to exceed 10 days, to correct the asserted violation. If the plaintiff is seeking to force the agency to open a meeting which has not yet been held, it need give the agency a maximum of only 2 days to act. The burden is on the agency to sustain its action. The district courts may grant appropriate equitable relief, such as ordering release of the transcript of an illegally closed meeting. The section does not confer any new jurisdiction on district courts, however, to invalidate an agency action taken at an illegally closed meeting.

Section 201(h). Allows any Federal court, otherwise authorized by law to review any agency action, to review an agency's compliance with this section. Such review may be conducted at the request of any person having standing. The reviewing court can afford any relief it deems appropriate, including reversing the action taken at an illegal meeting.

Section 201(i). Allows a court to award reasonable costs of litigation brought under this section to either of the parties. The costs may be awarded against an individual commissioner only if the court finds his violation of the statute was intentional and repeated. Costs may be awarded against the plaintiff only if the court finds the suit was brought for frivolous or dilatory reasons.

SECTION 203—MISCELLANEOUS

Subsection (a) provides that with the exception of such specific provisions as 201(e) governing the public's access to transcripts of closed meetings, nothing in Title II is intended to increase or decrease the public's right to obtain actual copies of documents under the Freedom of Information Act. Access to such written documents will continue to be governed as before by the Freedom of Information Act. The subsection also specifies that nothing in Title II authorizes the withholding of any information from Congress. The requirements of the Federal Records Act to retain documents for specified lengths of time are held inapplicable.

Subsection (b) provides specifically that nothing in the bill is intended to affect the applicability of the Privacy Act.

PROCEDURAL SHORTCUTS

The following is a list of the provisions which have been included in the bill in order to give agencies the procedural flexibility they need, and in order to protect the agencies from unnecessarily burdensome requirements:

(1) Section 201(a), (c)(2)

An agency may vote to close a meeting, to change the subject of a meeting, schedule a meeting less than seven days in advance by polling all its members. Thus, no time consuming meeting between the agency heads themselves will be necessary.

80-459 O - 77 - 24

(2) Section 201(c)(1)

If the agency meets for more than 1 day on the same issue it can vote once to close all the meetings for the next 30 days on the sace subject. Repeated votes will not be necessary.

(3) Section 201(d)

Where agency business requires, the agency may give less than seven days notice of a meeting. An agency may change the subject matter of a meeting it has already announced where agency business requires. Finally, if the agency business requires, the agency may vote to close at any time a meeting which previously it had announced would be open. In all these cases, the only requirement is that the agency vote that the meeting or the change is necessary and announce the information to the public at the earliest practicable opportunity. Thus an agency will retain necessary administrative flexibility at all times.

(4) Section 201(c)(3)

Any agency that must close a majority of its meetings because of the reasons specified in paragraph 6, 7A, 8 or 9 of 201(b) may utilize special, expedited procedures. Such as agency may adopt a general regulation specifying the types of meetings that will be closed. It then need only confirm by vote at the beginning of the meeting that the meeting does in fact involve sensitive matters covered by these exemptions. Notice of the date, place, and subject matter of the meeting must be made as soon as practicable, but not necessarily as much as seven days in advance of the meeting. In such case, no explanation need be given of why each such meeting must be closed to the public.

(5) Section 201(e)

If an agency opens a meeting to the public it need not keep any verbatim record of the proceedings. Verbatim records of most closed meetings are required, but an agency need not keep a transcript of every such meeting. Instead, it may just make an electronic recording of the closed meeting.

(6) Section 201(e)

The requirement that an agency keep a record of any meeting that it closes does not apply to meetings discussing adjudication, and thus closed pursuant to 201(b)(9).

(7) Section 201(e)

An agency is only required to release the tape or the transcript of a closed meeting to the public if the agency determines that it does not disclose information which should be kept confidential pursuant to subsection (b). An agency does not have to edit the record of a closed meeting word for word to remove confidential matter. An agency would have to disclose the record of a meeting only if no significant portion of the discussion of the agenda item contained confidential material. Any individual who wants a transcript of a tape that is disclosed to the public would have to pay for it himself.

Mr. CHILES. Mr. President, I pay particular thanks and appreciation to the following members of my staff who have worked very hard on this bill, George Patten, Margaret Maruschak, Vicki Smith of my staff, Pam Weller of Senator STONE's staff, and Paul Hoff, Marilyn Harris, and Jim Davidson of the staff of the Government Operations Committee. In addition, Prof. Dick Stewart gave valuable assistance in the early drafting stages.

Also, to the members and staff of Common Cause—David Cohen, Fred Wertheimer, and Ann McBride—whose efforts were invaluable both in developing this resolution and working for its passage. Without the valuable assistance from Common Cause, the progress of this legislation would have been much slower.

The PRESIDING OFFICER. The question is, Shall the bill pass? The yeas and nays have been ordered, and the clerk will call the roll.

The assistant legislative clerk called the roll.

Mr. ROBERT C. BYRD. I announce that the Senator from Indiana (Mr. Bayh), and the Senator from Missouri (Mr. Symington), are necessarily absent.

I further announce that the Senator from Indiana (Mr. Hartke), is absent on official business.

Mr. HUGH SCOTT. I announce that the Senator from Utah (Mr. Garn), the Senator from Michigan (Mr. Griffin), and the Senator from Illinois (Mr. Percy) are necessarily absent.

I further announce that, if present and voting, the Senator from Utah (Mr. Garn) and the Senator from Illinois (Mr. Percy), would each vote "yea."

The result was announced—yeas 94, nays 0, as follows:

[Rollcall Vote No. 472 Leg.]

YEAS—94

Abourezk	Goldwater	Morgan
Allen	Gravel	Moss
Baker	Hansen	Muskie
Bartlett	Hart, Gary	Nelson
Beall	Hart, Philip A.	Nunn
Bellmon	Haskell	Packwood
Bentsen	Hatfield	Pastore
Biden	Hathaway	Pearson
Brock	Helms	Pell
Brooke	Hollings	Proxmire
Buckley	Hruska	Randolph
Bumpers	Huddleston	Ribicoff
Burdick	Humphrey	Roth
Byrd, Harry F., Jr.	Inouye	Schweiker
Byrd, Robert C.	Jackson	Scott, Hugh
Cannon	Javits	Scott, William L.
Case	Johnston	Sparkman
Chiles	Kennedy	Stafford
Church	Laxalt	Stennis
Clark	Leahy	Stevens
Cranston	Long	Stevenson
Culver	Magnuson	Stone
Curtis	Mansfield	Taft
Dole	Mathias	Talmadge
Domenici	McClellan	Thurmond
Durkin	McClure	Tower
Eagleton	McGee	Tunney
Eastland	McGovern	Weicker
Fannin	McIntyre	Williams
Fong	Metcalf	Young
Ford	Mondale	
Glenn	Montoya	

NAYS—0

NOT VOTING—6

Bayh	Griffin	Percy
Garn	Hartke	Symington

Mr. CHILES. Mr. President, I move to reconsider the vote by which the bill was passed.

Mr. STEVENS. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Mr. CHILES. Mr. President, I ask unanimous consent that the Secretary of the Senate be authorized to make any necessary technical and clerical corrections in the engrossment of S. 5.

The PRESIDING OFFICER [Mr. FORD]. Without objection, it is so ordered.

Mr. CHILES. Mr. President, I call up my amendment amending the title to S. 5 and ask for its immediate consideration.

The PRESIDING OFFICER. The amendment will be stated.

The legislative clerk read as follows:

Amend the title to read as follows: An act to provide that meeting of Government agencies shall be open to the public and for other purposes.

The PRESIDING OFFICER. The question is on agreeing to the title amendment.

The amendment was agreed to.

So the title to S. 5 was thus amended.

[A copy of S. 5 as messaged to the House and referred to the House Government Operations Committee on November 10, 1975 follows:]

94TH CONGRESS
1ST SESSION

S. 5

IN THE HOUSE OF REPRESENTATIVES

NOVEMBER 10, 1975

Referred to the Committee on Government Operations

AN ACT

To provide that meetings of Government agencies shall be open to the public, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 SECTION 1. SHORT TITLE.—This Act may be cited as
4 the "Government in the Sunshine Act."
5 SEC. 2. DECLARATION OF POLICY.—It is hereby de-
6 clared to be the policy of the United States that the public
7 is entitled to the fullest practicable information regarding
8 the decisionmaking processes of the Federal Government.
9 It is the purpose of this Act to provide the public with such
10 information, while protecting the rights of individuals and
11 the ability of the Government to carry out its responsibilities.

1 SEC. 3. DEFINITIONS.—For purposes of this Act the
2 term "person" includes an individual, partnership, cor-
3 poration, association, or public or private organization other
4 than an agency.

5 SEC. 4. (a) This section applies, according to the pro-
6 visions thereof, to the Federal Election Commission and to
7 any agency, as defined in section 551 (1) of title 5, United
8 States Code, where the collegial body comprising the agency
9 consists of two or more individual members, at least a major-
10 ity of whom are appointed to such position by the President
11 with the advice and consent of the Senate. Except as provided
12 in subsection (b), all meetings of such collegial body, or of
13 a subdivision thereof authorized to take action on behalf of
14 the agency, shall be open to the public. For purposes of this
15 section, a meeting means the deliberations of at least the
16 number of individual agency members required to take action
17 on behalf of the agency where such deliberations concern the
18 joint conduct or disposition of official agency business.

19 (b) Except where the agency finds that the public in-
20 terest requires otherwise, (1) subsection (a) shall not apply
21 to any agency meeting, or any portion of an agency meeting,
22 or to any meeting, or any portion of a meeting, of a sub-
23 division thereof authorized to take action on behalf of the
24 agency, and, (2) the requirements of subsections (c) and
25 (d) shall not apply to any information pertaining to such

1 meeting otherwise required by this section to be disclosed to
2 the public, where the agency, or the subdivision thereof con-
3 ducting the meeting, properly determines that such portion
4 or portions of its meeting, or such information, can be reason-
5 ably expected to—

6 (1) disclose matters (A) specifically authorized
7 under criteria established by an Executive order to be
8 kept secret in the interests of national defense or foreign
9 policy and (B) are in fact properly classified pursuant
10 to such Executive order;

11 (2) relate solely to the agency's own internal
12 personnel rules and practices;

13 (3) disclose information of a personal nature
14 where disclosure would constitute a clearly unwarranted
15 invasion of personal privacy;

16 (4) involve accusing any person of a crime, or
17 formally censuring any person;

18 (5) disclose information contained in investigatory
19 records compiled for law enforcement purposes, but
20 only to the extent that the disclosure would (A) inter-
21 fere with enforcement proceedings, (B) deprive a
22 person of a right to a fair trial or an impartial ad-
23 judication, (C) constitute an unwarranted invasion of
24 personal privacy, (D) disclose the identity of a con-
25 fidential source, (E) in the case of a record compiled

1 by a criminal law enforcement authority in the course
2 of a criminal investigation, or by an agency conducting
3 a lawful national security intelligence investigation, dis-
4 close confidential information furnished only by the con-
5 fidential source, (F) disclose investigative techniques
6 and procedures, or (G) endanger the life or physical
7 safety of law enforcement personnel;
8 (6) disclose trade secrets, or financial or com-
9 mercial information obtained from any person, where
10 such trade secrets or other information could not be ob-
11 tained by the agency without a pledge of confidentiality,
12 or where such information must be withheld from the
13 public in order to prevent substantial injury to the com-
14 petitive position of the person to whom such information
15 relates;
16 (7) disclose information which must be withheld
17 from the public in order to avoid premature disclosure of
18 an action or a proposed action by—
19 (A) an agency which regulates currencies, se-
20 curities, commodities, or financial institutions where
21 such disclosure would (i) lead to significant finan-
22 cial speculation in currencies, securities, or commod-
23 ities, or (ii) significantly endanger the stability
24 of any financial institution;
25 (B) any agency where such disclosure would

1 significantly frustrate implementation of the pro-
2 posed agency action, or private action contingent
3 thereon; or
4 (C) any agency relating to the purchase by
5 such agency of real property.
6 This paragraph shall not apply in any instance where
7 the agency has already disclosed to the public the con-
8 tent or nature of its proposed action, or where the agency
9 is required by law to make such disclosure on its own
10 initiative prior to taking final agency action on such
11 proposal;
12 (8) disclose information contained in or related to
13 examination, operating, or condition reports prepared by,
14 on behalf of, or for the use of an agency responsible
15 for the regulation or supervision of financial institutions;
16 (9) specifically concern the agency's participation
17 in a civil action in Federal or State court, or the initia-
18 tion, conduct, or disposition by the agency of a particular
19 case of formal agency adjudication pursuant to the proce-
20 dures in section 554 of title 5, United States Code, or
21 otherwise involving a determination on the record after
22 opportunity for a hearing; or
23 (10) disclose information required to be withheld
24 from the public by any other statute establishing par-

1 ticular criteria or referring to particular types of
2 information.
3 (c) (1) Action under subsection (b) shall be taken only
4 when a majority of the entire membership of the agency, or
5 of the subdivision thereof authorized to conduct the meeting
6 on behalf of the agency, votes to take such action. A separate
7 vote of the agency members, or the members of a subdivision
8 thereof, shall be taken with respect to each agency meeting a
9 portion or portions of which are proposed to be closed to the
10 public pursuant to subsection (b), or with respect to any
11 information which is proposed to be withheld under subsec-
12 tion (b). A single vote may be taken with respect to a series
13 of meetings, a portion or portions of which are proposed to
14 be closed to the public, or with respect to any information
15 concerning such series of meetings, so long as each meeting in
16 such series involves the same particular matters, and is
17 scheduled to be held no more than thirty days after the initial
18 meeting in such series. The vote of each agency member par-
19 ticipating in such vote shall be recorded and no proxies shall
20 be allowed. Whenever any person whose interests may be
21 directly affected by a meeting requests that the agency close
22 a portion or portions of the meeting to the public for any of
23 the reasons referred to in paragraphs (3), (4), or (5) of
24 subsection (b), the agency shall vote whether to close such
25 meeting, upon request of any one of its members. Within one

1 day of any vote taken pursuant to this paragraph, the agency
2 shall make publicly available a written copy of such vote.
3 (2) If a meeting or portion thereof is closed to the
4 public, the agency shall, within one day of the vote taken
5 pursuant to paragraph (1) of this subsection, make publicly
6 available a full written explanation of its action closing the
7 meeting, or portion thereof, together with a list of all persons
8 expected to attend the meeting, and their affiliation.
9 (3) Any agency, a majority of whose meetings will
10 properly be closed to the public, in whole or in part, pursuant
11 to paragraphs (6), (7) (A), (8), or (9) of subsection (b),
12 or any combination thereof, may provide by regulation for
13 the closing of such meetings, or portion of such meetings, so
14 long as a majority of the members of the agency, or of the
15 subdivision thereof conducting the meeting, votes at the be-
16 ginning of such meeting, or portion thereof, to close the meet-
17 ing, and a copy of such vote is made available to the public.
18 The provisions of this subsection, and subsection (d), shall
19 not apply to any meeting to which such regulations apply:
20 *Provided*, That the agency shall, except to the extent that the
21 provisions of subsection (b) may apply, provide the public
22 with public announcement of the date, place, and subject mat-
23 ter of the meeting at the earliest practicable opportunity.
24 (d) In the case of each meeting, the agency shall make
25 public announcement, at least one week before the meeting,

1 of the date, place, and subject matter of the meeting, whether
2 open or closed to the public, and the name and phone number
3 of the official designated by the agency to respond to requests
4 for information about the meeting. Such announcement shall
5 be made unless a majority of the members of the agency,
6 or of the members of the subdivision thereof conducting the
7 meeting, determines by a vote that agency business requires
8 that such meetings be called at an earlier date, in which case
9 the agency shall make public announcement of the date,
10 place, and subject matter of such meeting, and whether open
11 or closed to the public, at the earliest practicable opportunity.
12 The subject matter of a meeting, or the determination of the
13 agency to open or close a meeting, or portion of a meeting,
14 to the public, may be changed following the public announce-
15 ment required by this paragraph if, (1) a majority of the
16 entire membership of the agency, or of the subdivision
17 thereof conducting the meeting, determines by a vote that
18 agency business so requires, and that no earlier announce-
19 ment of the change was possible, and, (2) the agency pub-
20 licly announces such change at the earliest practicable oppor-
21 tunity. Immediately following the public announcement re-
22 quired by this paragraph, notice of such announcement shall
23 also be submitted for publication in the Federal Register.
24 (e) A complete transcript or electronic recording ade-
25 quate to fully record the proceedings shall be made of each

1 meeting, or portion of a meeting, closed to the public, ex-
2 cept for a meeting, or portion of a meeting, closed to the
3 public pursuant to paragraph (9) of subsection (b). The
4 agency shall make promptly available to the public, in a place
5 easily accessible to the public, the complete transcript or elec-
6 tronic recording of the discussion at such meeting of any
7 item on the agenda, or of the testimony of any witness re-
8 ceived at such meeting, where no significant portion of such
9 discussion or testimony contains any information specified
10 in paragraphs (1) through (10) of subsection (b). Copies
11 of such transcript, or a transcription of such electronic re-
12 cording disclosing the identity of each speaker, shall be fur-
13 nished to any person at the actual cost of duplication or
14 transcription. The agency shall maintain a complete ver-
15 batim copy of the transcript, or a complete electronic record-
16 ing of each meeting, or portion of a meeting, closed to the
17 public, for a period of at least two years after such meeting,
18 or until one year after the conclusion of any agency pro-
19 ceeding with respect to which the meeting, or a portion
20 thereof, was held, whichever occurs later.

21 (f) Each agency subject to the requirements of this sec-
22 tion shall, within one hundred and eighty days after the en-
23 actment of this Act, following consultation with the Office of
24 the Chairman of the Administrative Conference of the United
25 States and published notice in the Federal Register of at least

1 thirty days and opportunity for written comment by any
2 persons, promulgate regulations to implement the require-
3 ments of subsections (a) through (e) of this section. Any
4 person may bring a proceeding in the United States Dis-
5 trict Court for the District of Columbia to require an agency
6 to promulgate such regulations if such agency has not pro-
7 mulgated such regulations within the time period specified
8 herein. Any person may bring a proceeding in the United
9 States Court of Appeals for the District of Columbia to set
10 aside agency regulations issued pursuant to this subsection
11 that are not in accord with the requirements of subsections
12 (a) through (e) of this section, and to require the promulga-
13 tion of regulations that are in accord with such subsections.
14 (g) The district courts of the United States have juris-
15 diction to enforce the requirements of subsections (a) through
16 (e) of this section by declaratory judgment, injunctive relief,
17 or other relief as may be appropriate. Such actions may be
18 brought by any person against an agency or its members
19 prior to, or within sixty days after, the meeting out of which
20 the violation of this section arises, except that if public an-
21 nouncement of such meeting is not initially provided by the
22 agency in accordance with the requirements of this section,
23 such action may be instituted pursuant to this section at any
24 time prior to sixty days after any public announcement of
25 such meeting. Before bringing such action, the plaintiff

1 shall first notify the agency of his intent to do so, and allow
2 the agency a reasonable period of time, not to exceed ten
3 days, to correct any violation of this section, except that
4 such reasonable period of time shall not be held to exceed
5 two working days where notification of such violation is
6 made prior to a meeting which the agency has voted to close.
7 Such actions may be brought in the district wherein the
8 plaintiff resides, or has his principal place of business, or
9 where the agency in question has its headquarters. In such
10 actions a defendant shall serve his answer within twenty days
11 after the service of the complaint. The burden is on the
12 defendant to sustain his action. In deciding such cases the
13 court may examine in camera any portion of a transcript or
14 electronic recording of a meeting closed to the public, and
15 may take such additional evidence as it deems necessary. The
16 court, having due regard for orderly administration and the
17 public interest, as well as the interests of the party, may
18 grant such equitable relief as it deems appropriate, includ-
19 ing granting an injunction against future violations of this
20 section, or ordering the agency to make available to the public
21 the transcript or electronic recording of any portion of a
22 meeting improperly closed to the public. Except to the extent
23 provided in subsection (h) of this section, nothing in this sec-
24 tion confers jurisdiction on any district court to set aside
25 or invalidate any agency action taken or discussed at an

1 agency meeting out of which the violation of this section
2 arose.

3 (h) Any Federal court otherwise authorized by law to
4 review agency action may, at the application of any person
5 properly participating in the proceeding pursuant to other
6 applicable law, inquire into violations by the agency of the
7 requirements of this section, and afford any such relief as it
8 deems appropriate.

9 (i) The court may assess against any party reason-
10 able attorney fees and other litigation costs reasonably in-
11 curred by any other party who substantially prevails in any
12 action brought in accordance with the provisions of sub-
13 section (f), (g), or (h) of this section. Costs may be
14 assessed against an individual member of an agency only in
15 the case where the court finds such agency member has
16 intentionally and repeatedly violated this section, or against
17 the plaintiff where the court finds that the suit was initiated
18 by the plaintiff for frivolous or dilatory purposes. In the
19 case of apportionment of costs against an agency, the costs
20 may be assessed by the court against the United States.

21 (j) The agencies subject to the requirements of this
22 section shall annually report to Congress regarding their
23 compliance with such requirements, including a tabulation
24 of the total number of agency meetings open to the public,
25 the total number of meetings closed to the public, the rea-

1 sons for closing such meetings, and a description of any
2 litigation brought against the agency under this section.
3 SEC. 5. (a) Section 557 of title 5, United States Code,
4 is amended by adding at the end thereof the following new
5 subsection:
6 "(d) In any agency proceeding which is subject to sub-
7 section (a) of this section, except to the extent required for
8 the disposition of ex parte matters as authorzized by law—
9 "(1) no interested person outside the agency shall
10 make or knowingly cause to be made to any member of
11 the body comprising the agency, administrative law
12 judge, or other employee who is or may reasonably be
13 expected to be involved in the decisional process of the
14 proceeding, an ex parte communication relevant to the
15 merits of the proceeding;
16 "(2) no member of the body comprising the agency,
17 administrative law judge, or other employee who is or
18 may reasonably be expected to be involved in the deci-
19 sional process of the proceeding, shall make or know-
20 ingly cause to be made to an interested person outside the
21 agency an ex parte communication relevant to the merits
22 of the proceeding;
23 "(3) a member of the body comprising the agency,
24 administrative law judge, or other employee who is or
25 may reasonably be expected to be involved in the deci-

80-459 O - 77 - 25

1 sional process of such proceeding who receives, or who
2 makes, a communication in violation of this subsection,
3 shall place on the public record of the proceeding:
4 "(A) written communications transmitted in
5 violation of this subsection;
6 "(B) memorandums stating the substance of all
7 oral communications occurring in violation of this
8 subsection; and
9 "(C) responses to the materials described in
10 subparagraphs (A) and (B) of this subsection;
11 "(4) upon receipt of a communication knowingly
12 made by a party, or which was knowingly caused to be
13 made by a party in violation of this subsection; the
14 agency, administrative law judge, or other employee
15 presiding at the hearing may, to the extent consistent
16 with the interests of justice and the policy of the under-
17 lying statutes, require the person or party to show cause
18 why his claim or interest in the proceeding should not
19 be dismissed, denied, disregarded, or otherwise adversely
20 affected by virtue of such violation;
21 "(5) the prohibitions of this subsection shall apply
22 at such time as the agency may designate, but in no case
23 shall they apply later than the time at which a proceed-
24 ing is noticed for hearing unless the person responsible
25 for the communication has knowledge that it will be

1 noticed, in which case the prohibitions shall apply at the
2 time of his acquisition of such knowledge.".
3 (b) Section 551 of title 5, United States Code, is
4 amended—
5 (1) by striking out "and" at the end of paragraph
6 (12);
7 (2) by striking out the "act." at the end of para-
8 graph (13) and inserting in lieu thereof "act; and"
9 (3) by adding at the end thereof the following new
10 paragraph:
11 "(14) 'ex parte communication' means an oral or
12 written communication not on the public record with
13 respect to which reasonable prior notice to all parties is
14 not given.".
15 (c) Section 556(d) of title 5, United States Code, is
16 amended by inserting between the third and fourth sentences
17 thereof the following new sentence: "The agency may, to the
18 extent consistent with the interests of justice and the policy
19 of the underlying statutes administered by the agency, con-
20 sider a violation of section 557(d) of this title sufficient
21 grounds for a decision adverse to a party who has knowingly
22 committed such violation or knowingly caused such violation
23 to occur.".
24 SEC. 6. (a) Except as specifically provided by section
25 4, nothing in section 4 confers any additional rights on

1 any person, or limits the present rights of any such person,
2 to inspect or copy, under section 552 of title 5, United
3 States Code, any documents or other written material
4 within the possession of any agency. In the case of any
5 request made pursuant to section 552 of title 5, United
6 States Code, to copy or inspect the transcripts or electronic
7 recordings described in section 4(e), the provisions of this
8 Act shall govern whether such transcripts or electronic re-
9 cordings shall be made available in accordance with such
10 request. The requirements of chapter 33 of title 44, United
11 States Code, shall not apply to the transcripts and electronic
12 recordings described in section 4(e). This Act does not
13 authorize any information to be withheld from Congress.
14 (b) Nothing in section 4 authorizes any agency to
15 withhold from any individual any record, including tran-
16 scripts or electronic recordings required by this Act, which
17 is otherwise accessible to that individual under section 552a
18 of title 5, United States Code.
19 SEC. 7. The provisions of this Act shall become effec-
20 tive one hundred and eighty days after the date on which

1 this Act is enacted, except that the provisions of section 4
2 requiring the issuance of regulations to implement such sec-
3 tion shall become effective upon enactment.

Passed the Senate November 6, 1975.

Attest: FRANCIS R. VALEO,
Secretary.

HOUSE ACTION

[From the Congressional Record—House, Jan. 6, 1973]

(H 43–H 44)

Federal Government in the Sunshine—Open Meetings Legislation

(Mr. Fascell asked and was given permission to address the House for 1 minute, and to revise and extend his remarks and include extraneous matter.)

Mr. Fascell. Mr. Speaker, I have introduced H.R. 4, "the Federal Government in the sunshine" bill, with substantial bipartisan support. This is a vital step in our efforts to eliminate secrecy in government, to make the Congress more responsive to the people, and to strengthen the legislative branch of Government, by requiring that all meetings, with specified execptions, be open to the public.

In testimony before the Mathias-Stevenson ad hoc hearings on congressional reorganization last month, John Gardner, chairman of Common Cause, succinctly summarized the need for the "government in the sunshine" bill. Mr. Gardner said:

> Doing the public's business in secret severs the link of accountability between the elected official and his constituents. What they can't see, they can't judge. Accountability depends on access.

The "sunshine" bill provides that access, both to the deliberative process of the House and Senate, and to the decisionmaking processes of the executive branch.

The bill I am introducing is identical to open meetings legislation sponsored in the 92d Congress in the Senate by Florida Senator Lawton Chiles. I also sponsored the bill in the last Congress. It is patterned after the Florida "sunshine" law enacted in 1967, and its main provisions include:

A requirement that all meetings, including those to conduct hearings, of Government agencies, at which official action is taken, considered, or discussed, shall be open to the public, with specified exceptions; a requirement that most meetings of congressional committees shall be open to the public; a requirement that a transcript of all meetings described above be made available to the public; and court enforcement of the open meetings requirement for Federal agencies.

Exceptions to these provisions would be in matters relating to national defense and security; items required by statute to be kept confidential; meetings related to internal management of an agency or committee; or disciplinary proceedings which could adversely affect the reputation of an individual.

The provisions relating to the meetings of the House and Senate apply to all meetings, including executive sessions for markup of bills and conference committees. In the 92d Congress, 44 percent of all House committee meetings were closed to the public. In the Appropriations Committee, 92 percent of all meetings were conducted behind

closed doors, and in the Ways and Means Committee, 63 percent were so conducted. Clearly, in my judgment, the public has a right to know how decisions were reached on how the taxpayers' money is to be allocated, and the Congress has the responsibility to insure that they do know.

I am not implying, nor would I, that actions taken by any committee in secret are actions which would have necessarily been different had the meetings been held in open session. The fact is, that the public and Members of Congress as well, ought to know how decisions were reached, what alternatives were considered and discarded, and why.

We in the Congress have only to gain from enactment of an open meetings law. The level of public confidence in the legislative process is seriously low. By insuring full access to our decisionmaking process, we can eliminate any uncertainties, and help to restore the public's confidence in its elected officials. We can increase the Congress' accountability by increasing the public's access to Congress' work.

We face a fundamental challenge with the convening of the 93d Congress. That challenge is whether the Congress will meaningfully reassert its initiative in the policymaking process, reestablish its role as a viable force for leadership and change, and assume its constitutional responsibility and authority. Enactment of the open meetings law would aid the Congress in its efforts to meet this challenge.

The unprecedented secrecy in the executive branch has been cited as one of the reasons for the steady erosion of congressional influence on Government policies. Congress, it has been said, exists today merely to ratify or modify proposals submitted by the Executive. Clearly this is an exaggeration but, nevertheless, if Congress and the public had access to the decisionmaking processes within the departments and agencies of Government, we could insure that the intent of Congress, as expressed in the legislation we enact, is carried out.

Unless Congress takes the initiative, the executive branch will continue to centralize all policymaking functions, keeping them from scrutiny by the Congress and the public. The Sunshine bill, by providing full access at all levels of government, will not only provide for greater accountability of the government to the people, but also, I believe, strengthen the role of Congress.

A frequent criticism of the open-meetings proposal is that it would encourage and foster secret preconference agreements which would then be approved, pro forma, in an open meeting. Clearly this possibility exists, and we must make certain that safeguards against the circumvention of the bill's intent are included in any legislation enacted.

In Florida, some officials did try to circumvent the State law by holding informal sessions in private. The Florida courts have ruled in such case, however, that a secret meeting occurs when officials meet so as to avoid being seen or heard by the public, and that whether the meeting is formal or not, such secretive action violates the Sunshine Law. As a result of a series of State court decisions, all meetings of government officials must be, and I believe for the most part are, open to the public.

The bill, as now written, gives the U.S. district courts original jurisdiction over actions brought against any federal government agency which fails to comply with the bill's open meetings requirement. One of the issues which will have to be resolved during hearings is what

enforcement procedure should be established for congressional meetings.

Mr. Speaker, on the Senate side, the chairman of the Government Operations Subcommittee on Executive Reorganization and Government Research, Senator ARBAHAM RIBICOFF, has announced that hearings will be held on open meetings legislation early this year. I am hopeful that with broad, bipartisan support, similar hearings will be held by the Rules Committee in the House, and serious consideration will be given to this proposal early in the session.

I am inserting a list of those Members who have agreed to cosponsor H.R. 4 the Federal Government sunshine bill and the text of the bill. I urge all Members to study the bill's provisions carefully, and join with us in supporting this effort to make the Congress and the executive branch more responsive to the people.

The very concept of democracy implies open government, where the people can participate or at least know what actions affecting their lives are being taken. Yet, there are hundreds of examples of unnecessary secrecy throughout our Government, in the executive branch, the regulatory agencies and within the Congress as well.

The budget making and appropriations process is one area which most certainly should be open to public view and yet, as I discussed, is one of the most closed areas we have.

The people of Florida recognized this need when they passed the State sunshine law in 1967. The time has come for the Federal Government to take such positive action as well.

This bill, while forging new paths toward a more responsive government, is also a continuation of reforms that have already been achieved and steps that have already been taken. In the early 1950's Congress enacted what can be called a charter of citizen access by establishing the principle, under the Freedom of Information Act, that the work of the Government and its bureaucrats is really the work of the people and, as such, subject to review and inspection by the people. By removing the veil of secrecy that shrouded much government activity, the Freedom of Information Act focused rays of light on the dark recesses of conduct.

All this is to say that the task of letting sunshine into the operation of government is a continuing one—one that is guided by the simple standard that government acts best when its actions are known, its officials accountable, and its policies responsive.

I include the following:

LIST OF SPONSORS

Mr. Fascell, Mr. Hamilton, Mr. Fish, Mr. Waldie, Ms. Abzug, Mr. Gude, Mr. Reuss, Mr. Udall, Mr. Gibbons, Mr. Rosenthal, Mr. Rees, Mr. Ware, Mr. Leggett, Mr. Charles H. Wilson, Mr. Zwach, Mr. Drinan, Mr. McCloskey, Mr. Yatron, Mr. Studds, Mr. Andrews of North Dakota, Mr. Helstoski, Mr. Brasco;

Mr. Conyers, Mr. O'Hara, Mr. Stokes, Mr. Mayne, Mr. Bell, Mr. W. C. (Dan) Daniel, Mr. Conte, Mr. Owens, Mr. Mazzoli, Mr. Podell, Mr. Rogers, Mr. Haley, Mr. Pritchard, Mr. Harrington, Mr. Moss, Mr. Fraser, Mr. Jones of Oklahoma, Mr. Gunter, Mr. Aspin, Mr. Zablocki, Mr. Hechler of West Virginia.

H.R. 4

A bill to provide that meetings of Government agencies and of congressional committees shall be open to the public, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America assembled, That (a) except as provided in subsection (b), all meet-

ings (including meetings to conduct hearings) of any Government agency at which any official action is considered or discussed shall be open to the public.

(b) Subsection (a) shall not apply to that portion of any meetings in which the action or proposed action to be taken, considered, or discussed by an agency—

(1) relates to a matter affecting the national security,

(2) relates solely to the internal management of such agency,

(3) might tend to reflect adversely on the character or reputation of any individual who is subject to any proposed or potential sanction by such agency, or

(4) might divulge matters required to be kept confidential under (specified statutory provisions).

Provided, That this subsection does not authorize closed meetings or the withholding of information from the public except as specifically stated in this subsection, and is not authority to withhold information from Congress.

(c) Each agency subject to the requirements of this section shall, within one hundred and eighty days after the effective date of this Act, establish through publication in the Federal Register procedures for providing public notice of meetings required by this section to be open to the public. Such notice shall be given as far in advance of meetings as is practicable, in order to facilitate attendance of such meetings by persons desirous of doing so.

SEC. 2. (a) Section 133(b) of the Legislative Reorganization Act of 1946 as amended by section 103(a) of the Legislative Reorganization Act of 1970 is amended as follows:

"(1) Each meeting (including meetings to conduct hearings) of each standing, select, special or conference committee of the Senate shall be open to the public, except when the committee determines that the matters to be discussed, or the testimony to be taken, relates to a matter of national security, relates solely to the internal management of such committee, may tend to reflect adversely on the character or reputation of the witness or any other individual, or may divulge matters required to be kept confidential under other provisions of law."

(2) Clause 27(f)(2) of rule XI of the Rules of the House of Representatives is amended to read as follows: "Each meeting (including meetings to conduct hearings) of each standing, select, special, or conference committee shall be open to the public, except when the committee determines that the matters to be discussed, or the testimony to be taken, relates to a matter of national security, relates solely to the internal management of such committee, may tend to reflect adversely on the character or reputation of the witness or any other individual or may divulge matters required to be kept confidential under other provisions of law."

SEC. 3. A transcript shall promptly be made of each meeting which is open to the public pursuant to the provisions of this Act and copies of such transcript shall promptly be made available for public inspection and copying.

SEC. 4. The district courts of the United States shall have original jurisdiction of actions to render declaratory judgments or to enforce, by injunction or otherwise, the first section of this Act and section 3 insofar as it relates to that section. Such actions may be brought by any person in the district where such person resides, or has his principal place of business, or where the agency whose action is complained of resides.

SEC. 5. DEFINITIONS.—For the purpose of the Act—

(1) "Government agency" means each authority of the Government of the United States (whether or not it is within or subject to review by another Government agency) having more than one member, but does not include—

(a) the Congress

(b) the courts of the United States

(c) military authorities.

(2) "person" includes an individual, partnership, corporation, association, a public or private organization other than an agency.

SEC. 6. This Act shall take effect on the ninetieth day after the date of its enactment.

[From the Congressional Record—House, Aug. 3, 1973]

(H 7482–H 7483)

Government in the Sunshine

(Mr. Fascell asked and was given permission to extend his remarks at this point in the Record and to include extraneous matter.)

Mr. Fascell. Mr. Speaker, the phrase "freedom of information" takes on greater importance daily as the Senate Select Committee on Presidential Campaign Activities continues to delve into the Watergate incident and related activities of the 1972 Presidential campaign. The claim of executive privilege, which clearly denies information not only to the Congress but to the Nation as well, has become a major tool for the withholding of Government material. The propriety of certain actions by the U.S. Department of Agriculture in negotiating last year's grain agreement with the Soviet Union has been questioned with respect to those who perhaps had advance knowledge of the sale while the vast majority of Americans were kept in the dark. Furthermore, indictments have been brought against former Government officials who are charged with exercising improper influence in proceedings before the Securities and Exchange Commission.

These are only a few of the issues and incidents which seem to point to a growing inclination on the part of Government to pursue a course dedicated to letting the people know only that information which the Government feels they should know. Decisionmaking in the Government clearly follows a closed-door, need-to-know policy, weighted in favor of a select few.

Early in the 93d Congress I introduced legislation called the Federal Government in the sunshine bill with the bipartisan support of more than 50 Members of the House. Patterned after the State "sunshine law" in Florida, that bill was designed to eliminate secrecy in both the executive and legislative branches of the Government by making deliberative processes in both branches open to public scrutiny.

With the initial, strong support of the Democratic caucus, a major objective of the "sunshine" bill was achieved early in March when the House adopted House Resolution 259. That resolution, which I sponsored, amended the Rules of the House to strengthen the presumption that all committee meetings—including those for the marking up of bills, which have traditionally been held in executive or closed session—should be open unless action is taken in open session by a recorded vote to close such meetings.

Prior to the adoption of this rule, Congressional Quarterly reported that 42 percent of the meetings held in the House during the 1972 session were closed to the public and the press. A study by Common Cause following adoption of the rule change, from March 7 through June 15, showed that of 284 meetings to draft bills, 47 were held in closed session, or approximately 16 percent.

I am hopeful that the positive experience of many committees which have held open markup sessions will lead to an even better record in future months. Of particular concern is the way Federal funds are allocated. With one exception, all House Appropriations Committee and subcommittee markup sessions have, I understand, been held in closed session. While I am sure the committee faces unique problems, I also feel that the public has a right to know what factors lead to congressional decisions on how to spend the public's money.

Today, however, I am introducing legislation to focus singularly on executive branch deliberations and agency procedures.

Following the introduction of S. 3881 in the 92d Congress by Senator Lawton Chiles, he worked with interested parties in redrafting the "sunshine" bill to make certain provisions more specific and to include additional requirements including a prohibition on all ex parte communications in cases of rulemaking or adjudication by an agency. The bill I am introducing today is identical to the provisions contained in title II—Agency Procedures—of the redrafted bill introduced in the 93d Congress as S. 260 by Senator Chiles.

This bill would require that all meetings of multimember Federal agencies—at which any official action is discussed, considered, or taken—must normally be open to the public. These meetings could be closed only if their proceedings fell within one or more of the specific exemptions as prescribed by this act and only if a majority of the membership, in a public vote, decided to close the meeting. These exemptions are offered in the form of broad categories. They would include matters relating to national defense and security; items required by statute to be kept confidential; meetings related to internal management of an agency or committee; and disciplinary proceedings which could adversely affect the reputation of an individual. I am confident that these broad categories can be improved upon greatly with the full benefit of public input and committee consideration.

Furthermore, the bill provides that any citizens could challenge an agency's implementing regulations or decision to close a particular meeting. In such cases the courts would decide whether the material in question conforms to the spirit of this act and whether it falls within the domain of that specific exemption as enacted in the law.

Of particular importance I feel is the provision of the bill regarding ex parte communications between an interested person and a member or employee of the agency in the following types of proceedings:

Any case of agency adjudication or rulemaking on the record which under the Administrative Procedure Act is subject to a requirement of trial-type procedures;

Any agency rulemaking proceedings with respect to which the agency is required by the Administrative Procedure Act to afford public notice and opportunity for comment by interested persons;

Any proceedings to prepare an environmental impact statement required under the National Environmental Protection Act.

The agency involved would be required to publish any such ex parte communications on the public record.

This is an issue which I have been concerned with since 1960 when I first introduced legislation entitled the "Agency Hearing Standards of Conduct Act." That bill proposed a mandatory requirement that all communications with an agency, direct or indirect, regarding

matters adversary in nature, be made openly and as a part of the agency proceeding in question. As proposed, it would have applied to all agency hearing proceedings which by law are subject to notice and opportunity for hearing—just as the sunshine bill requires. After notice of hearing, it would have been unlawful for any agency employee connected with the case to permit, entertain, or consider any interview, argument or communication concerning the case except through official hearing procedures. Any such attempts would be required to be disclosed as the sunshine bill requires.

Very stringent ex parte provisions were included in the Postal Reorganization Act of 1970 with respect to the Postal Rate Commission proceedings. In addition, I notice that the Attorney General has indicated that the Department of Justice will keep a record of all contacts and communications by persons outside the Department.

These are admirable steps, but I believe that the prohibition should apply uniformly to all agency proceedings involving adjudication or rulemaking. This is a very critical issue which has had the full support of the American Bar Association since at least 1956. Since that time the ABA has endorsed and supported efforts to enact the necessary Federal legislation. In a resolution adopted by the ABA House of Delegates in 1958, the Association stated:

> The American Bar Association has repeatedly urged that the organization and procedure of federal administrative agencies in the exercise of adjudicatory powers provide (1) that hearing officers be assured independence of judgment and impartiality in the trial of agency cases, (2) that the integrity of the judicial process at all levels in the agency be protected by confining decisions to the public hearing record in an environment totally free from any *ex parte* off-the-record representations, influences or pressures from any source.

In addition to making sure that all agency proceedings are free from "influence peddling," it is equally important that agency deliberations be conducted in open session. Instances of Federal administrative agencies conducting closed meetings on matters of substantial public concern are not uncommon. Oftentimes, closed meetings are such well-kept secrets that the public is not even aware that meetings are being held. The first contact that the public might have with the regulations promulgated by the agency could very well be at the point of administration.

I offer as an example of this practice the Federal Power Commission's proposed rulemaking to establish a uniform national rate for natural gas—docket No. R–389B. The FPC in proposing this rulemaking has sought little public input for its consideration. No public hearings were planned on these measures. Furthermore, there is little reason to think that the FPC would open up its meetings on this proposal as it has been FPC policy to keep Commission meetings closed.

The problem of natural gas pricing is one of great concern to the general public. The proposal under consideration by the FPC would have a tremendous impact on the availability and allocation of this very important energy resource. The "energy crisis" is not a private problem but a public one. As such, consideration of this rulemaking which will contribute to the determination of our national energy policy must be debated and scrutinized in a public forum.

Common Cause, a strong advocate of eliminating secrecy in government, has FPC's plans on the ratesetting proposals. In recent weeks they have pressed the FPC to fully open up its consideration of this

proposal to the public. In response to Common Cause's efforts, the FPC has promised to "consider" opening up its proceedings on this issue. Not surprisingly, this consideration will take place behind closed doors.

In January, I spoke of the fundamental challenge facing the 93d Congress:

> That challenge is whether the Congress will meaningful reassert its initiative in the policymaking process, reestablish its role as a viable force for leadership and change, and assume its constitutional responsibility and authority.

Six months later this challenge still remains for the Congress to confront, and the stakes are even higher than I had envisioned. The unprecedented secrecy within the executive branch continues to subvert a proper balance within our Government by denying both the Congress and the public access to information which is rightfully theirs. This is justified by extraordinary interpretations of such loosely defined principles as "Executive privilege" and "national security."

The results are unmistakable. The executive branch has sought to centralize all policymaking functions; and I am sorry to say, it has been all too successful in this quest. This success is in no small part due to the proliferation of secrecy at all levels of Government operations. Secrecy and covert operations have served to distort the perspective of too many elements of our Government. A democratic government must remain accountable to the public which it is serving, Congress must take the initiative and remove the veil of secrecy from our Government and reestablish its link of accountability with the people.

I hope that consideration can be given to the "sunshine" proposal in ongoing efforts to strengthen and expand the Freedom of Information Act. I urge our colleagues to join in support of this important measure.

93D CONGRESS
1ST SESSION

H. R. 10000

IN THE HOUSE OF REPRESENTATIVES

AUGUST 3, 1973

Mr. FASCELL introduced the following bill; which was referred to the Committee on Government Operations

A BILL

To provide that meetings of Government agencies shall be open to the public, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 SECTION 1. SHORT TITLE.—This Act may be cited as
4 the "Government in the Sunshine Act".
5 SEC. 2. DECLARATION OF POLICY.—It is hereby de-
6 clared to be the policy of the United States that the public
7 is entitled to the fullest practicable information regarding
8 the decisionmaking processes of the Federal Government.
9 SEC. 3. DEFINITIONS.—For purposes of this Act—
10 (1) "National security" means—
11 (A) the protection of the United States against

80-459 O - 77 - 26

1 actual or potential attack or other hostile acts of a foreign
2 power;
3 (B) the obtaining of foreign intelligence information
4 deemed essential to the security of the United States;
5 (C) the protection of national security information
6 against foreign intelligence activities; or
7 (D) the protection, to the extent deemed necessary
8 by the President of the United States against the over-
9 throw of the Government by force; and
10 (2) "Person" includes an individual, partnership, cor-
11 poration, associated governmental authority, or public or
12 private organization.

13 AGENCY PROCEDURES

14 SEC. 4. (a) This section applies, according to the pro-
15 visions thereof, to any agency, as defined in section 551
16 (1) of title 5, United States Code, where the body com-
17 prising the agency consists of two or more members. Ex-
18 cept as provided in subsection (b), all meetings (includ-
19 ing meetings to conduct hearings) of such agencies at
20 which official action is considered or discussed shall be open
21 to the public.
22 (b) Subsection (a) shall not apply to any portion or
23 portions of an agency meeting where the agency determines
24 by vote of a majority of its entire membership—
25 (1) will probably disclose matters necessary to be

1 kept secret in the interests of national security or the
2 confidential conduct of the foreign relations of the United
3 States;
4 (2) will relate solely to individual agency personnel
5 or to internal agency office management and proce-
6 dures or financial auditing;
7 (3) will tend to charge with crime or misconduct,
8 or to disgrace, injure the professional standing or other-
9 wise expose to public contempt of obloquy any individ-
10 ual, or will represent a clearly unwarranted invasion of
11 the privacy of any individual: *Provided,* That this sub-
12 section shall not apply to any government ~~x~~ officer or
13 employee with respect to his official duties or employ-
14 ment: *And provided further,* That as applied to a wit-
15 ness at a meeting to conduct a hearing, this subsection
16 shall not apply unless the witness requests in writing that
17 the hearing be closed to the public;
18 (4) will probably disclose the identity of any in-
19 former or law enforcement agent or of any information
20 relating to the investigation or prosecution of a criminal
21 offense that is required to be kept secret in the interests
22 of effective law enforcement;
23 (5) will disclose information relating to the trade
24 secrets or financial or commercial information pertaining
25 specifically to a given person where—

1 (A) the information has been obtained by the
2 Federal Government on a confidential basis other
3 than through an application by such person for a
4 specific government financial or other benefit; and
5 (B) Federal statute requires the information to
6 be kept confidential by government officers and em-
7 ployees, and
8 (C) the information is required to be kept secret
9 in order to prevent undue injury to the competitive
10 position of such persons;
11 (6) will relate to the conduct or disposition (but
12 not the initiation) of a case of adjudication governed by
13 the provisions of the first paragraph of section 554 (a)
14 of title 5, United States Code, or of subsection (1), (2),
15 (4), (5), or (6) thereof.
16 A separate vote of the agency members shall be taken with
17 respect to each agency meeting that is closed to the public
18 pursuant to this subsection. The vote of each agency mem-
19 ber participating in such vote shall be recorded and published
20 and no proxies shall be allowed. In the case of any closing
21 of portions of a meeting to the public pursuant to this sub-
22 section, the agency shall promptly publish an explanation of
23 its action.
24 (c) Each agency shall make public announcement of
25 the date, place, and subject matter of each meeting at which

1 official action is considered or discussed (whether open or
2 closed to the public) at least one week before each meeting
3 unless the agency determines by a vote of the majority of
4 its members that agency business requires that such meetings
5 be called at an earlier date, in which case the agency shall
6 make public announcement of the date, place, and subject
7 matter of such meeting at the earliest practicable opportunity.
8 (d) A complete transcript, including a list of all per-
9 sons attending and their affiliations, shall be made of each
10 meeting of each agency at which official action is considered
11 or discussed (whether open or closed to the public). Except
12 as provided in subsection (e) of this section a copy of each
13 such meeting shall be made available to the public for inspec-
14 tion, and additional copies of any transcript shall be furnished
15 to any person at the actual cost of duplication.
16 (e) In the case of meetings closed to the public pur-
17 suant to subsection (b) of this section, the agency may
18 delete from the copies of transcripts made available or fur-
19 nished to the public pursuant to subsection (d) of this section
20 those portions, which the agency determines by vote of a
21 majority of its membership consists of materials specified in
22 paragraph (1), (2), (3), (4), or (5) of subsection (b) of
23 this section. A separate vote of the agency shall be taken with
24 respect to each transcript. The vote of each agency member
25 participating in such vote shall be recorded and published,

1 and no proxies shall be allowed. In place of each portion
2 deleted from copies of the meeting transcript made available
3 to the public, the agency shall supply a written explanation
4 of why such portion was deleted and a summary of the sub-
5 stance of the deleted portion that does not itself disclose in-
6 formation specified in paragraph (1), (2), (3), (4), or
7 (5) of subsection (a). The agency shall maintain a complete
8 verbatim copy of the transcript of each meeting (including
9 those portions deleted from copies made available to the
10 public) for a period of at least two years after such meeting.
11 (f) Each agency subject to the requirements of this
12 section shall, within one hundred and eighty days after the
13 enactment of this Act, following published notice in the Fed-
14 eral Register of at least thirty days and opportunity for
15 written comment by interested persons, promulgate reg-
16 ulations to implement the requirements of subsections (a)
17 through (e) inclusive of this section, Any citizen or person
18 resident in the United States may bring a proceeding in the
19 United States Court of Appeals for the District of Columbia
20 Circuit—
21 (1) to require an agency to promulgate such reg-
22 ulations if such agency has not promulgated such reg-
23 ulations within the time period specified herein; or
24 (2) to set aside agency regulations issued pursuant
25 to this subsection that are not in accord with the require-

1 ments of subsections (a) through (e) of this section
2 inclusive, and to require the promulgation of regulations
3 that are in accord with such subsections.
4 (g) The district courts of the United States shall have
5 jurisdiction to enforce the requirements of subsections (a)
6 through (e) inclusive of this section by declaratory judg-
7 ment, injunctive relief, or otherwise. Such actions may be
8 brought by any citizen or person resident in the United
9 States. Such actions shall be brought in the district wherein
10 the plaintiff resides, or has his principal place of business,
11 or where the agency in question has its headquarters. In
12 deciding such cases the court may examine any portion of
13 a meeting transcript that was deleted from the publicly
14 available copy. Among other forms of equitable relief, the
15 court may require that any portion of a meeting transcript
16 improperly deleted from the publicly available copy be made
17 publicly available for inspection and copying, and, having
18 due regard for orderly administration and the public interest,
19 may set aside any agency action taken or discussed at an
20 agency meeting improperly closed to the public.
21 (h) In any action brought pursuant to subsection (f)
22 or (g) of this section, costs of litigation (including reason-
23 able attorney's and expert witness fees) may be apportioned
24 to the original parties or their successors in interest when-
25 ever the court determines such award is appropriate.

1 (i) The agencies subject to the requirements of this
2 section shall annually report to Congress regarding their
3 compliance with such requirements, including a tabulation
4 of the total number of agency meetings open to the public,
5 the total number of meetings closed to the public, the reasons
6 for closing such meetings, and a description of any litigation
7 brought against the agency under this section.

8 SEC. 5. (a) Title 5 of the United States Code is
9 amended by adding after section 557 the following:

10 "EX PARTE COMMUNICATIONS IN AGENCY PROCEEDING

11 "SEC. 557. (a) This section applies, according to the
12 provisions thereof, to the following proceedings:

13 "(1) any proceeding to which section 557 (a) of
14 this title applies;

15 "(2) any rulemaking proceeding with respect to
16 which an agency is required by section 553 of this title
17 to afford public notice and opportunity for participation
18 by interested persons: *Provided,* That for purposes of
19 this section the exemption from such requirements in
20 section 553 (a) (2) of matters relating to public prop-
21 erty, loans, grants, benefits, or contracts shall not be
22 effective; or

23 "(3) any proceeding to prepare an environmental
24 impact statement required by section 102 (2) (c) of the
25 National Environmental Policy Act.

1 "(b) In any agency proceeding which is subject to
2 subsection (a) of this section, except to the extent required
3 for the disposition of ex parte matters as authorized by
4 law—

5 "(1) no interested person (including members or
6 employees of other government agencies) shall make or
7 cause to be made to any member of the agency in ques-
8 tion, hearing examiner, or employee who is or may be
9 involved in the decisional process of said proceeding, an
10 ex parte communication relevant to the events of the
11 proceeding;

12 "(2) no member of the agency in question, hearing
13 examiner, or employee who is or may be involved in the
14 decisional process of said proceeding, shall make or
15 cause to be made to an interested person an ex parte
16 communication relevant to the merits of the proceeding;

17 "(3) a member of the agency in question, hearing
18 examiner, or employee who is or may be involved in the
19 decisional process of said proceeding, who receives a
20 communication in violation of this subsection shall place
21 in the public record of the proceeding—

22 "(A) written material submitted in violation of
23 this subsection; or

24 "(B) memorandums stating the substance of

1 all oral communications submitted in violation of
2 this subsection; or
3 "(C) responses to the materials described in
4 subparagraphs (A) and (B) of this subsection;
5 "(4) upon receipt of a communication in violation
6 of this subsection from a party to any proceeding to
7 which this section applies, the hearing examiner or em-
8 ployee presiding at the hearings may, to the extent
9 consistent with the interests of justice and the policy
10 of the underlying statutes, require the persons or party to
11 show cause why his claim or interest in the proceeding
12 should not be discussed, denied, disregarded, or other-
13 wise adversely affected by virtue of such violation; and
14 "(5) the prohibitions of this subsection shall apply
15 at such time as the agency shall designate, having due
16 regard for the public interest in open decisionmaking
17 by agencies, but in no case shall they apply later than
18 the time at which a proceeding is noticed for hearing
19 or opportunity for participation by interested persons
20 unless the person is responsible for the communication
21 has knowledge that it will be noticed, in which case
22 said prohibition shall apply at the time of his acquisition
23 of such knowledge.
24 "(c) Each agency subject to the requirements of this
25 section shall, within one hundred and eighty days after the

1 enactment of this section, following published notice in
2 the Federal Register of at least thirty days and opportu-
3 nity for written comment by interested persons, promul-
4 gate regulations to implement the requirements of subsec-
5 tion (b) of this section. Any citizen or person resident
6 in the United States may bring a proceeding in the United
7 States Court of Appeals for the District of Columbia
8 Circuit—

9 "(1) to require any agency to promulgate such
10 regulations if such agency has not promulgated such
11 regulations within the time period specified herein;

12 "(2) to set aside agency regulations issued pursu-
13 ant to this subsection that are not in accord with the
14 requirements of subsection (b) of this section; and to
15 require the promulgation of regulations that are in
16 accord with such subsection.

17 "(d) The district courts of the United States shall have
18 jurisdiction to enforce the requirements of subsection (b)
19 of this section by declaratory judgment, injunctive relief,
20 or otherwise. Such action may be brought by any citizen
21 of or person resident in the United States. Such actions
22 shall be brought in the district wherein the plaintiff re-
23 sides or has his principal place of business or where the
24 agency in question has its headquarters. Where a person
25 other than an agency, agency member, hearing examiner,

1 or employee is alleged to have participated in a violation
2 of the requirements of subsection (b) of this section such
3 person may, but need not be joined with the agency as
4 a party defendant; for purposes of joining such person
5 as a party defendant, service may be had on such person
6 in any district. Among other forms of equitable relief, the
7 court may require that any ex parte communication made
8 or received in violation of the requirements of subsection
9 (b) of this section be published, and, having due regard
10 for orderly administration and the public interest, may
11 set aside any agency action taken in a proceeding with
12 respect to which the violation occurred.

13 "(e) In any action brought pursuant to subsection
14 (c) or (d) of this subsection, cost of litigation (includ-
15 ing reasonable attorney's and expert witness fees) may
16 be apportioned to the original parties or their successors
17 in interest whenever the court determines such award is
18 appropriate."

19 SEC. 6. This title and the amendments made by this
20 title do not authorize withholding of information or limit
21 the availability of records to the public except as provided in
22 this title. This title is not to be construed as authority to
23 withhold information from Congress.

[From the Congressional Record—House, Mar. 18, 1975]

(H 1939–H 1942)

Government in the Sunshine Act

(Mr. Fascell asked and was given permission to extend his remarks at this point in the Record and to include extraneous matter.)

Mr. Fascell. Mr. Speaker, I am today reintroducing the Government in the Sunshine bill which I sponsored in the 93d Congress. More than 50 of our colleagues joined me in the 93d sponsoring this important measure which would require that all meetings of multimember Federal agencies at which official agency business is considered or discussed shall be open to the public. The senior Senator from Florida, Senator Lawton Chiles, is the principal sponsor and major force behind this legislation in the Senate where hearings were held by a Subcommittee of the Government Operations Committee last year.

The very concept of democracy implies open Government, where the people can participate or at least know what actions affecting their lives are being taken. The Congress has taken important steps in the last several years to open up its own proceedings. In 1973, the House adopted legislation which I sponsored amending the rules to strengthen the requirement for open hearings and open committee meetings including meetings for the markup of legislation. Prior to that action, 56 percent of House hearings and meetings were open to the public in 1972. In contrast, under the stronger open meetings rule adopted in the 93d Congress, 92 percent of all House committee hearings and markup sessions were open to the public in 1974.

At the beginning of this Congress, the House adopted another rule change which I sponsored to require that House-Senate conference committee meetings be held in open session unless a majority of the conferees of either body voted to close the session. The Senate Democratic Caucus and the Republican conference have adopted resolutions in support of this change, and implementing legislation is now pending before the Senate Rules and Administration Committee.

These actions have served to significantly open up the legislative process to public scrutiny as it should be. The most effective way to restore public confidence in the operation of the Congress and to erase doubt sconcerning possible conflicts of interest, is to do away with secrecy and make the process more open—so that the public can follow committee deliberations and know-how decisions are reached and for what reasons.

The public has an equal right to know how the agencies of the executive branch are interpreting the laws enacted by the Congress. The legislation I am introducing today would provide that opportunity, and open up many of the deliberations of Federal agencies.

I hope that the House will act on the proposal this Congress. I urge the support of all Members and welcome any suggestions for strengthening or otherwise perfecting the proposal. The active support for

meaningful reforms which the Members of the 94th Congress have demonstrated gives me great hope that efforts to open up the deliberations of the executive agencies will benefit from their commitment and make the Government more responsive and accessible to the people.

The text of the Government in the Sunshine proposal follows:

H.R. 5075

A bill to provide that meetings of Government agencies and of congressional committees shall be open to the public, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.—This Act may be cited as the "Government in the Sunshine Act".

SEC. 2. DECLARATION OF POLICY.—It is hereby declared to be the policy of the United States that the public is entitled to the fullest practicable information regarding the decisionmaking processes of the Federal Government.

SEC. 3. DEFINITIONS.—For purposes of this Act—

(1) "National defense" means—

(A) the protection of the United States and its military forces against actual or potential military attack by a foreign power;

(B) the obtaining of foreign intelligence information deemed essential to the military defense of the United States or its forces;

(C) the protection of information essential to the military defense of the United States or its forces against foreign intelligence activities; or

(D) the protection, to the extent specifically found necessary by the President in writing, of the United States against overthrow of the Government by force; and

(2) "Person" includes an individual, partnership, corporation, associated governmental authority, or public or private organization.

AGENCY PROCEDURES

SEC. 4. (a) This section applies, according to the provisions thereof, to any agency, as defined in section 551(1) of title 5, United States Code, where the body comprising the agency consists of two or more members. Except as provided in subsection (b), all meetings (including meetings to conduct hearings) of such agencies, or a subdivision thereof authorized to take action on behalf of the agency, shall be open to the public. For purposes of this section, a meeting consists of any procedure by which official agency business is considered or discussed by at least the number of agency members (or of members of a subdivision of the agency authorized to take action on behalf of the agency), required to take action on behalf of the agency.

(b) Subsection (a) shall not apply to any portion or portions of an agency meeting where the agency determines by a vote of majority of its entire membership, or, in the case of a subdivision thereof authorized to take action on behalf of the agency, a majority of the membership of such subdivision, that such portion or portions of the meeting—

(1) will disclose matters necessary to be kept secret in the interest of national defense or the necessarily confidential conduct of the foreign policy of the United States;

(2) will relate solely to individual agency personnel or to internal agency office management and administration or financial auditing;

(3) will tend to charge with crime or misconduct, or to disgrace any person, or will represent a clearly unwarranted invasion of the privacy of any individual: *Provided*, That this paragraph shall not apply to any Government officer or employee with respect to his official duties or employment: *And provided further*, That as applied to a witness at a meeting this paragraph shall not apply unless the witness requests in writing that the meeting be closed to the public;

(4) will disclose information pertaining to any investigation conducted for law enforcement purposes, but only to the extent that the disclosure would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair source and, in the case of a record compiled by a criminal law enforcement trial or an impartial adjudication, (C) disclose the identity of a confidential authority in the course of a criminal investigation, or by an agency conducting

a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (D) discloses investigative techniques and procedures, (E) endanger the life or physical safety of law enforcement personnel; or (F) in the case of an agency authorized to regulate the issuance or trading of securities, disclose information concerning such securities, or the markets in which they are traded, when such information must be kept confidential in order to avoid premature speculation in the trading of such securities; or

(5) will disclose information relating to the trade secrets or financial or commercial information pertaining specifically to a given person where—

(A) a Federal statute requires the information to be kept confidential by Government officers and employees; or

(B) the information has been obtained by the Federal Government on a confidential basis other than through an application by such person for a specific Government financial or other benefit and the information must be kept secret in order to prevent grave and irreparable injury to the competitive position of such person;

(6) will relate to the conduct or disposition (but not the initiation) of a case of adjudication governed by the provisions of the first paragraph of section 554(a) of title 5, United States Code, or of subsection (1), (2), (4), (5), or (6) thereof.

A separate vote of the agency members, or the members of a subdivision thereof authorized to take action on behalf of the agency, shall be taken with respect to each agency meeting a portion or portions of which are proposed to be closed to the public pursuant to this subsection. The vote of each agency member participating in such vote shall be recorded and no proxies shall be allowed. Within one day of such vote, the agency shall make publicly available a written copy of such vote and, if a meeting or portion thereof is closed to the public, a full written explanation of its action.

(c) Each agency shall make public announcement of the date, place, and subject matter of each meeting, and whether open or closed to the public, at least one week before each meeting. Such announcement shall be made unless the agency determines by a vote of the majority of its members, or in the case of a subdivision thereof authorized to take action on behalf of the agency, a majority of the members of the subdivision, that agency business requires that such meetings be called at an earlier date, in which case the agency shall make public announcement of the date, place, and subject matter of such meeting, and whether open or closed to the public, at the earliest practicable opportunity.

(d) A complete transcript or electronic recording adequate to fully record the proceedings shall be made of each meeting of each agency (whether open or closed to the public). Except as provided in subsection (e) of this section a copy of the transcript or electronic recording of each such meeting, together with any official minutes of such meeting, shall be made available to the public for inspection, and additional copies of any such transcript, minutes, or recording (or a copy of a transcription of the electronic recording), shall be furnished to any person at the actual cost of duplication or transcription. Notwithstanding the provisions of subsection (e), in the case of meetings closed to the public, the portion of such transcript made available for public inspection or electronic recording shall include a list of all persons attending and their affiliation, except for any portion of such list which would disclose the identity of a confidential source, or endanger the life or physical safety of law enforcement personnel.

(e) In the case of meetings closed to the public pursuant to subsection (b) of this section, the agency may delete from the copies of transcripts, electronic recordings, and minutes made available or furnished to the public pursuant to subsection (d) of this section, those portions which the agency determines by vote of a majority of its membership consist of materials specified in paragraph (1), (2), (3), (4), (5), or (6) of subsection (b) of this section. A separate vote of the agency shall be taken with respect to each transcript, electronic recording, or minutes. The vote of each agency member participating in such vote shall be recorded and published, and no proxies shall be allowed. In place of each portion deleted from copies of the meeting transcript, electronic recording, and minutes made available to the public, the agency shall supply a full written explanation of why such portion was deleted and a summary of the substance of the deleted portion that does not itself disclose information specified in paragraph (1), (2), (3), (4), (5), or (6) of subsection (b). The agency shall maintain a complete verbatim copy of the transcript, or a complete electronic recording of each meeting (including those portions deleted from copies made available to the

public), for a period of at least two years after such meeting, or until one year after the conclusion of any proceeding with respect to which the meeting, or a portion thereof, was held, whichever occurs later.

(f) Each agency subject to the requirements of this section shall, within three hundred and sixty days after the enactment of this Act, following consultation with the Administrative Conference of the United States and published notice in the Federal Register of at least thirty days and opportunity for written comment by any persons, promulgate regulations to implement the requirements of subsections (a) through (e) inclusive of this section. Such regulations must, prior to final promulgation, receive the approval in writing of the Assistant Attorney General, Office of Legal Counsel, certifying that in his opinion the regulations are in accord with the requirements of this section. Any citizen or person resident in the United States may bring a proceediing in the United States Court of Appeals for the District of Columbia Circuit—

(1) to require an agency to promulgate such regulations if such agency has not promulgated such regulations within the time period specified herein; or

(2) to set aside agency regulations issued pursuant to this subsection that are not in accord with the requirements of subsections (a) through (e) inclusive of this section, and to require the promulgation of regulations that are in accord with such subsections.

(g) The district courts of the United States shall have jurisdiction to enforce the requirements of subsections (a) through (e) inclusive of this section by declaratory judgment, injunctive relief, or otherwise. Such actions shall be brought within sixty days after the meeting whose closing is challenged as a violation of this section: *Provided*, That if public notice of such meeting was not provided by the agency in accordance with the requirements of this section, such action shall be brought within sixty days of such meeting or such public announcement, whichever is the later. Such actions shall be brought against an agency and its members by any citizen or person resident in the United States. Such actions may be brought in the district wherein the plaintiff resides, or has his principal place of business, or where the agency in question has its headquarters. In such actions a defendant shall serve his answer within twenty days after the service of the complaint. The burden is on the agency to sustain its action. Except as to causes the court considers of greater importance, proceedings before the district court, as authorized by this paragraph, take precedence on the docket over all other causes and shall be assigned a hearing and trial at the earliest practicable date and expedited in every way. In deciding such cases the court may examine any portion of a meeting transcript or electronic recording that was deleted from the publicly available copy and may take such additional evidence as it deeems necessary. Among other forms of equitable relief, including the granting of an injunction against future violations of this section, the court may require that any portion of a meeting transcript or electronic recording improperly deleted from the publicly available copy be made publicly available for inspection and copying, and, having due regard for orderly administration and the public interest, may set aside any agency action taken or discussed at an agency meeting improperly closed to the public. The jurisdiction of the district courts under this subsection shall be concurrent with that of any other court otherwise authorized by law to review agency action. Any such court may, at the application of any person otherwise properly a party to a proceeding before such court to review an agency action, inquire into asserted violations by the agency of the requirements of this section and afford the relief authorized by this section in the case of proceedings by district courts.

(h) In any action brought pursuant to subsection (f) or (g) of this section, the reasonable costs of litigation (including reasonable fees for attorneys and expert witnesses) may be apportioned to the original parties or their successors in interest whenever the court determines such award is appropriate. In the case of apportionment of costs against an agency or its members, the costs may be assessed by the court against the United States.

(i) The agencies subject to the requirements of this section shall annually report to Congress regarding their compliance with such requirements, including a tabulation of the total number of agency meetings open to the public, the total number of meetings closed to the public, the reasons for closing such meetings, and a description of any litigation brought against the agency under this section.

SEC. 5. Title 5 of the United Code is amended by adding after section 557 the following:

"EX PARTE COMMUNICATIONS IN AGENCY PROCEEDING

"SEC. 557A. (a) DEFINITIONS.—For purposes of this section—

"(1) 'Ex parte communication' means a communication relevant to an on-the-record agency proceeding where such communication is not made on the record, or openly at a scheduled hearing session in such proceeding, and reasonable notice thereof is not given to all parties to, or intervenors in, such proceedings.

"(2) 'Interested person' means any person (including a member or employee of any Government agency or authority) other than a member or employee of the agency before which the on-the-record proceeding is pending who communicates with an agency member or employee with respect to any such on-the-record agency proceeding.

"(3) 'On-the-record agency proceeding' means any proceeding before any agency where the agency action, or a portion thereof, is required by law to be determined on the record after an opportunity for an agency hearing.

"(b) This section applies to any on-the-record agency proceeding.

"(c) In any agency proceeding which is subject to subsection (b) of this section—

"(1) no interested person shall make or cause to be made to any member of the agency in question, administrative judge, or employee who is or may be involved in the decisional process of the proceeding any ex parte communication;

"(2) no member of the agency in question, administrative judge, or employee who is or may be involved in the decisional process of the proceeding shall make or cause to be made to an interested person any ex parte communication;

"(3) a member of the agency in question, administrative judge, or employee who is or may be involved in the decisional process of the proceeding, who receives a communication in violation of this subsection, shall place in the public record of the proceeding—

"(A) any written material submitted in violation of this subsection; and

"(B) a memorandum stating the substance of each oral communication submitted in violation of this subsection; and

"(C) responses, if any, to the materials described in subparagraphs (A) and (B) of this subsection;

"(4) upon obtaining knowledge of a communication in violation of this subsection prompted by or from a party or intervenor to any proceeding to which this section applies, the agency members or member, the administrative judge, or employee presiding at the hearings may, to the extent consistent with the interests of justice and the policy of the underlying statutes, require the party or intervenors to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected by virtue of such violation.

"(d) The prohibitions of this section shall not apply—

"(1) to any proceeding to the extent required for the disposition of ex parte matters as authorized by law;

"(2) to any written communication from persons who are neither parties or intervenors to the proceeding, nor government officials acting in their official capacity, where such communications are promptly placed in the public docket file of the proceedings.

"(e) The prohibitions of this section shall apply at such time as the agency shall designate, having due regard for the public interest in open decisionmaking by agencies, but in no case shall they apply later than the time at which a proceeding is notice for hearing. If a person responsible for the communication has knowledge that the proceeding will be noticed, the prohibitions of this section shall apply at the time of his acquisition of such knowledge. In the case of any person who files with an agency any application, petition, or other form of request for agency action, the prohibitions of this section shall apply, with respect to communications with such person, commencing at the time of such filing or at the time otherwise provided by this subsection, whichever occurs first.

"(f) Every agency notice of an opportunity for participation by interested persons in a hearing shall contain a statement as follows:

"(1) if such notice relates to an on-the-record agency proceeding, it shall state that the proceeding is subject to the provisions of this section with respect to ex parte communications;

"(2) if such notice relates to an agency proceeding not on-the-record, it shall state that the proceeding is not subject to the provisions of this section with respect to ex parte communications.

80-459 O - 77 - 27

If a notice of hearing with respect to any proceeding before an agency fails to comply with this section, the proceeding shall be deemed to be an on-the-record agency proceeding for purposes of ex parte communications.

"(g) Each agency subject to the requirements of this section shall, within three hundred and sixty days after the enactment of this section, following consultation with the Administrative Conference of the United States and published notice in the Federal Register of at least thirty days and opportunity for written comment, promulgate regulations to implement the requirements of this section. Any citizen or person resident in the United States may bring a proceeding in the United States Court of Appeals for the District of Columbia Circuit—

"(1) to require any agency to promulgate regulations if the agency has not promulgated such regulations within the time period specified; or

"(2) to set aside agency regulations issued pursuant to this subsection that are not in accord with the requirements of this section, and to require the promulgation of regulations that are in accord with this section.

"(h) Nothing in this section shall be construed to permit any communication which is prohibited by any other provision of law, or to prohibit any agency from adopting, by rule or otherwise, prohibitions or regulations governing ex parte communications which are additional to, or more stringent than, the requirements of this section.

"(i) The district courts of the United States shall have jurisdiction to enforce the requirements of subsections (c) and (e) of this section by declaratory judgment, injunctive relief, or otherwise. The action may be brought by any citizen of or person resident in the United States. The action shall be brought in the district wherein the plaintiff resides or has his principal place of business, or where the agency in question has its headquarters. Where a person other than an agency, agency member, administrative judge, or employee is alleged to have participated in a violation of the requirements of this section, such person may, but need not, be joined as a party defendant; for purposes of joining such person as a party defendant, service may be had on such person in any district. Among other forms of equitable relief, the court may require that any ex parte communication made or received in violation of the requirements of this section be published, and, having due regard for orderly administration and the public interest, may set aside any agency action taken in a proceeding where the violation occurred. The jurisdiction of the district courts under this subsection shall be concurrent with that of any other court otherwise authorized by law to review agency action. Any such court may, at the application of any person otherwise properly a party to a proceeding before such court to review an agency action, inquire into asserted violations by the agency of the requirements of this section, and afford the relief authorized by this section in the case of proceedings by district courts.

"(j) In any action brought pursuant to subsections (g) and (i) of this section, the cost of litigation (including reasonable fees for attorneys and expert witnesses) may be apportioned to the original parties or their successors in interest whenever the court determines such award is appropriate."

SEC. 6. This Act and the amendments made by this Act do not authorize withholding of information or limit the availability of records to the public except as provided in this title. This Act does not authorize any information to be withheld from Congress.

94TH CONGRESS
1ST SESSION

H. R. 9868

IN THE HOUSE OF REPRESENTATIVES

SEPTEMBER 26, 1975

Mr. FASCELL (for himself and Ms. ABZUG) introduced the following bill; which was referred to the Committee on Government Operations

A BILL

To provide that meetings of Government agencies shall be open to the public, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 SECTION 1. SHORT TITLE.—This Act may be cited as
4 the "Government in the Sunshine Act".
5 SEC. 2. DECLARATION OF POLICY.—It is hereby de-
6 clared to be the policy of the United States that the public
7 is entitled to the fullest practicable information regarding
8 the decisionmaking processes of the Federal Government.
9 It is the purpose of this Act to provide the public with such
10 information, while protecting the rights of indivduals and
11 the ability of the Government to carry out its responsibilities.

I

1 SEC. 3. DEFINITIONS.—For purposes of this Act the
2 term, "person" includes an individual, partnership, cor-
3 poration, association, or public or private organization other
4 than an agency.

5 AGENCY PROCEDURES

6 SEC. 4. (a) This section applies, according to the pro-
7 visions thereof, to the Federal Election Commission and to
8 any agency, as defined in section 551 (1) of title 5, United
9 States Code, where the collegial body comprising the agency
10 consists of two or more individual members, at least a major-
11 ity of whom are appointed to such position by the President
12 with the advice and consent of the Senate. Except as provided
13 in subsection (b), all meetings of such collegial body, or of
14 a subdivision thereof authorized to take action on behalf of
15 the agency, shall be open to the public. For purposes of this
16 section, a meeting means the deliberations of at least the
17 number of individual agency members required to take action
18 on behalf of the agency where such deliberations concern the
19 joint conduct or disposition of official agency business.

20 (b) Except where the agency finds that the public in-
21 terest requires otherwise, (1) subsection (a) shall not apply
22 to any agency meeting, or any portion of an agency meeting,
23 or to any meeting, or any portion of a meeting, of a sub-
24 division thereof authorized to take action on behalf of the
25 agency, and, (2) the requirements of subsections (c) and

1 (d) shall not apply to any information pertaining to such
2 meeting otherwise required by this section to be disclosed to
3 the public, where the agency, or the subdivision thereof con-
4 ducting the meeting, properly determines that such portion
5 or portions of its meeting, or such information, can be reason-
6 ably expected to—

7 (1) disclose matters (A) specifically authorized
8 under criteria established by an Executive order to be
9 kept secret in the interests of national defense or foreign
10 policy and (B) are in fact properly classified pursuant
11 to such Executive order;

12 (2) relate solely to the agency's own internal per-
13 sonnel rules and practices;

14 (3) disclose information of a personal nature where
15 disclosure would constitute a clearly unwarranted inva-
16 sion of personal privacy;

17 (4) involve accusing any person of a crime, or
18 formally censuring any person;

19 (5) disclose information contained in investigatory
20 records compiled for law enforcement purposes, but only
21 to the extent that the disclosure would (A) interfere
22 with enforcement proceedings, (B) deprive a person
23 of a right to a fair trial or an impartial adjudication,
24 (C) constitute an unwarranted invasion of personal
25 privacy, (D) disclose the identity of a confidential

1 source, (E) in the case of a record compiled by a
2 criminal law enforcement authority in the course of a
3 criminal investigation, or by an agency conducting a
4 lawful national security intelligence investigation, dis-
5 close confidential information furnished only by the con-
6 fidential source, (F) disclose investigative techniques
7 and procedures, or (G) endanger the life or physical
8 safety of law enforcement personnel;

9 (6) disclose trade secrets, or financial or commer-
10 cial information obtained from any person, where such
11 trade secrets or other information could not be obtained
12 by the agency without a pledge of confidentiality, or
13 where such information must be withheld from the public
14 in order to prevent substantial injury to the competitive
15 position of the person to whom such information relates;

16 (7) disclose information which must be withheld
17 from the public in order to avoid premature disclosure of
18 an action or a proposed action by—

19 (A) an agency which regulates currencies,
20 securities, commodities, or financial institutions
21 where such disclosure would (i) lead to serious
22 financial speculation in currencies, securities, or
23 commodities, or (ii) seriously endanger the stability
24 of any financial institution;

1 (B) any agency where such disclosure would
2 seriously frustrate implementation of the proposed
3 agency action, or private action contingent thereon;
4 or
5 (C) any agency relating to the purchase by
6 such agency of real property.
7 This paragraph shall not apply in any instance where
8 the agency has already disclosed to the public the con-
9 tent or nature of its proposed action, or where the agency
10 is required by law to make such disclosure on its own
11 initiative prior to taking final agency action on such
12 proposal;
13 (8) disclose information contained in or related to
14 examination, operating, or condition reports prepared by,
15 on behalf of, or for the use of an agency responsible
16 for the regulation or supervision of financial institutions;
17 (9) specifically concern the agency's participation
18 in a civil action in Federal or State court, or the initia-
19 tion, conduct, or disposition by the agency of a particular
20 case of formal agency adjudication pursuant to the proce-
21 dures in section 554 of title 5, United States Code, or
22 otherwise involving a determination on the record after
23 opportunity for a hearing; or
24 (10) disclose information required to be withheld

1 from the public by any other statute establishing particu-
2 lar criteria or referring to particular types of
3 information.

4 (c) (1) Action under subsection (b) shall be taken only
5 when a majority of the entire membership of the agency, or
6 of the subdivision thereof authorized to conduct the meeting
7 on behalf of the agency, votes to take such action. A separate
8 vote of the agency members, or the members of a subdivision
9 thereof, shall be taken with respect to each agency meeting a
10 portion or portions of which are proposed to be closed to the
11 public pursuant to subsection (b), or with respect to any
12 information which is proposed to be withheld under subsec-
13 tion (b). A single vote may be taken with respect to a series
14 of meetings, a portion or portions of which are proposed to
15 be closed to the public, or with respect to any information
16 concerning such series of meetings, so long as each meeting in
17 such series involves the same particular matters, and is
18 scheduled to be held no more than thirty days after the initial
19 meeting in such series. The vote of each agency member par-
20 ticipating in such vote shall be recorded and no proxies shall
21 be allowed. Whenever any person whose interests may be
22 directly affected by a meeting requests that the agency close
23 a portion or portions of the meeting to the public for any of
24 the reasons referred to in paragraphs (3), (4), or (5) of
25 subsection (b), the agency shall vote whether to close such

1 meeting, upon request of any one of its members. Within one
2 day of any vote taken pursuant to this paragraph, the agency
3 shall make publicly available a written copy of such vote.
4 (2) If a meeting or portion thereof is closed to the
5 public, the agency shall, within one day of the vote taken
6 pursuant to paragraph (1) of this subsection, make publicly
7 available a full written explanation of its action closing the
8 meeting, or portion thereof, together with a list of all persons
9 expected to attend the meeting, and their affiliation.
10 (3) Any agency, a majority of whose meetings will
11 properly be closed to the public, in whole or in part, pursuant
12 to paragraphs (6), (7) (A), (8), or (9) of subsection
13 (b), or any combination thereof, may provide by regulation
14 for the closing of such meetings, or portion of such meetings,
15 so long as a majority of the members of the agency, or of the
16 subdivision thereof conducting the meeting, votes at the
17 beginning of such meeting, or portion thereof, to close the
18 meeting, and a copy of such vote is made available to the
19 public. The provisions of this subsection, and subsection (d),
20 shall not apply to any meeting to which such regulations
21 apply: *Provided*, That the agency shall, except to the extent
22 that the provisions of subsection (b) may apply, provide
23 the public with public announcement of the date, place, and
24 subject matter of the meeting at the earliest practicable
25 opportunity.

1 (d) In the case of each meeting, the agency shall make
2 public announcement, at least one week before the meeting,
3 of the date, place, and subject matter of the meeting, whether
4 open or closed to the public, and the name and phone number
5 of the official designated by the agency to respond to requests
6 for information about the meeting. Such announcement shall
7 be made unless a majority of the members of the agency,
8 or of the members of the subdivision thereof conducting the
9 meeting, determines by a vote that agency business requires
10 that such meetings be called at an earlier date, in which case
11 the agency shall make public announcement of the date,
12 place, and subject matter of such meeting, and whether open
13 or closed to the public, at the earliest practicable opportunity.
14 The subject matter of a meeting, or the determination of the
15 agency to open or close a meeting, or portion of a meeting,
16 to the public, may be changed following the public announce-
17 ment required by this paragraph if, (1) a majority of the
18 entire membership of the agency, or of the subdivision
19 thereof conducting the meeting, determines by a vote that
20 agency business so requires, and that no earlier announce-
21 ment of the change was possible, and, (2) the agency pub-
22 licly announces such change at the earliest practicable oppor-
23 tunity. Immediately following the public announcement re-
24 quired by this paragraph, notice of such announcement shall
25 also be submitted for publication in the Federal Register.

1 (e) A complete transcript or electronic recording ade-
2 quate to fully record the proceedings shall be made of each
3 meeting, or portion of a meeting, closed to the public, ex-
4 cept for a meeting, or portion of a meeting, closed to the
5 public pursuant to paragraph (9) of subsection (b). The
6 agency shall make promptly available to the public, in a place
7 easily accessible to the public, the complete transcript or elec-
8 tronic recording of the discussion at such meeting of any
9 item on the agenda, or of the testimony of any witness re-
10 ceived at such meeting, where no significant portion of such
11 discussion or testimony contains any information specified
12 in paragraphs (1) through (10) of subsection (b). Copies
13 of such transcript, or a transcription of such electronic re-
14 cording disclosing the identity of each speaker, shall be fur-
15 nished to any person at the actual cost of duplication or
16 transcription. The agency shall maintain a complete ver-
17 batim copy of the transcript, or a complete electronic record-
18 ing of each meeting, or portion of a meeting, closed to the
19 public, for a period of at least two years after such meeting,
20 or until one year after the conclusion of any agency pro-
21 ceeding with respect to which the meeting, or a portion
22 thereof, was held, whichever occurs later.
23 (f) Each agency subject to the requirements of this sec-
24 tion shall, within one hundred and eighty days after the en-

1 actment of this Act, following consultation with the Office of
2 the Chairman of the Administrative Conference of the United
3 States and published notice in the Federal Register of at least
4 thirty days and opportunity for written comment by any
5 persons, promulgate regulations to implement the require-
6 ments of subsections (a) through (e) of this section. Any
7 person may bring a proceeding in the United States Dis-
8 trict Court for the District of Columbia to require an agency
9 to promulgate such regulations if such agency has not pro-
10 mulgated such regulations within the time period specified
11 herein. Any person may bring a proceeding in the United
12 States Court of Appeals for the District of Columbia to set
13 aside agency regulations issued pursuant to this subsection
14 that are not in accord with the requirements of subsections
15 (a) through (e) of this section, and to require the promulga-
16 tion of regulations that are in accord with such subsections.
17 (g) The district courts of the United States have juris-
18 diction to enforce the requirements of subsections (a)
19 through (e) of this section by declaratory judgment, injunc-
20 tive relief, or other relief as may be appropriate. Such actions
21 may be brought by any person against an agency or its mem-
22 bers prior to, or within sixty days after, the meeting out of
23 which the violation of this section arises, except that if public
24 announcement of such meeting is not initially provided by the
25 agency in accordance with the requirements of this section,

1 such action may be instituted pursuant to this section at any
2 time prior to sixty days after any public announcement of
3 such meeting. Before bringing such action, the plaintiff
4 shall first notify the agency of his intent to do so, and allow
5 the agency a reasonable period of time, not to exceed ten
6 days, to correct any violation of this section, except that
7 such reasonable period of time shall not be held to exceed
8 two working days where notification of such violation is
9 made prior to a meeting which the agency has voted to close.
10 Such actions may be brought in the district wherein the
11 plaintiff resides, or has his principal place of business, or
12 where the agency in question has its headquarters. In such
13 actions a defendant shall serve his answer within twenty days
14 after the service of the complaint. The burden is on the
15 defendant to sustain his action. In deciding such cases the
16 court may examine in camera any portion of a transcript or
17 electronic recording of a meeting closed to the public, and
18 may take such additional evidence as it deems necessary. The
19 court, having due regard for orderly administration and the
20 public interest, as well as the interests of the party, may
21 grant such equitable relief as it deems appropriate, includ-
22 ing granting an injunction against future violations of this
23 section, or ordering the agency to make available to the public
24 the transcript or electronic recording of any portion of a
25 meeting improperly closed to the public. Except to the extent

1 provided in subsection (h) of this section, nothing in this sec-
2 tion confers jurisdiction on any district court to set aside
3 or invalidate any agency action taken or discussed at an
4 agency meeting out of which the violation of this section
5 arose.

6 (h) Any Federal court otherwise authorized by law to
7 review agency action may, at the application of any person
8 properly participating in the proceeding pursuant to other
9 applicable law, inquire into violations by the agency of the
10 requirements of this section, and afford any such relief as it
11 deems appropriate.

12 (i) The court may assess against any party reason-
13 able attorney fees and other litigation costs reasonably in-
14 curred by any other party who substantially prevails in any
15 action brought in accordance with the provisions of sub-
16 section (f), (g), or (h) of this section. Costs may be
17 assessed against an individual member of an agency only in
18 the case where the court finds such agency member has
19 intentionally and repeatedly violated this section, or against
20 the plaintiff where the court finds that the suit was initiated
21 by the plaintiff for frivolous or dilatory purposes. In the
22 case of apportionment of costs against an agency, the costs
23 may be assessed by the court against the United States.

24 (j) The agencies subject to the requirements of this
25 section shall annually report to Congress regarding their

1 compliance with such requirements, including a tabulation
2 of the total number of agency meetings open to the public,
3 the total number of meetings closed to the public, the rea-
4 sons for closing such meetings, and a description of any
5 litigation brought against the agency under this section.

6 SEC. 5. (a) Section 557 of title 5, United States Code,
7 is amended by adding at the end thereof the following new
8 subsection:

9 "(d) In any agency proceeding which is subject to sub-
10 section (a) of this section, except to the extent required for
11 the disposition of ex parte matters as authorized by law—

12 "(1) no interested person outside the agency shall
13 make or knowingly cause to be made to any member of
14 the body comprising the agency, administrative law
15 judge, or other employee who is or may reasonably be
16 expected to be involved in the decisional process of the
17 proceeding, an ex parte communication relevant to the
18 merits of the proceeding;

19 "(2) no member of the body comprising the agency,
20 administrative law judge, or other employee who is or
21 may reasonably be expected to be involved in the de-
22 cisional process of the proceeding, shall make or know-
23 ingly cause to be made to an interested person outside
24 the agency an ex parte communication relevant to the
25 merits of the proceeding;

1 "(3) a member of the body comprising the agency,
2 administrative law judge, or other employee who is or
3 may reasonably be expected to be involved in the de-
4 cisional process of such proceeding who receives, or
5 who makes, a communication in violation of this sub-
6 section, shall place on the public record of the pro-
7 ceeding:
8 "(A) written communications transmitted in
9 violation of this subsection;
10 "(B) memorandums stating the substance of
11 all oral communications occurring in violation of
12 this subsection; and
13 "(C) responses to the materials described in
14 subparagraphs (A) and (B) of this subsection;
15 "(4) upon receipt of a communication knowingly
16 made by a party, or which was knowingly caused to be
17 made by a party in violation of this subsection; the
18 agency, administrative law judge, or other employee
19 presiding at the hearing may, to the extent consistent
20 with the interests of justice and the policy of the under-
21 lying statutes, require the person or party to show cause
22 why his claim or interest in the proceeding should not
23 be dismissed, denied, disregarded, or otherwise adversely
24 affected by virtue of such violation;
25 "(5) the prohibitions of this subsection shall apply

1 at such time as the agency may designate, but in no case
2 shall they apply later than the time at which a proceeding
3 is noticed for hearing unless the person responsible for
4 the communication has knowledge that it will be noticed,
5 in which case the prohibitions shall apply at the time of
6 his acquisition of such knowledge.".
7 (b) The second sentence of section 554 (d) of title 5,
8 United States Code, is amended to read as follows: "Such
9 employee may not be responsible to or subject to the super-
10 vision or direction of an employee or agent engaged in the
11 performance of investigative or prosecuting functions for an
12 agency.".
13 (c) Section 551 of title 5, United States Code, is
14 amended—
15 (1) by striking out "and" at the end of paragraph
16 (12);
17 (2) by striking out the "act." at the end of para-
18 graph (13) and inserting in lieu thereof "act; and"
19 (3) by adding at the end thereof the following new
20 paragraph:
21 "(14) 'ex parte communication' means an oral or
22 written communication not on the public record with
23 respect to which reasonable prior notice to all parties is
24 not given.".
25 (d) Section 556 (d) of title 5, United States Code, is

80-459 O - 77 - 28

1 amended by inserting between the third and fourth sentences
2 thereof the following new sentence: "The agency may, to the
3 extent consistent with the interests of justice and the policy
4 of the underlying statutes administered by the agency, con-
5 sider a violation of section 557 (d) of this title sufficient
6 grounds for a decision adverse to a party who has knowingly
7 committed such violation or knowingly caused such violation
8 to occur.".

9 SEC. 6. (a) Except as specifically provided by section
10 201, nothing in section 201 confers any additional rights
11 on any person, or limits the present rights of any such
12 person, to inspect or copy, under section 552 of title 5,
13 United States Code, any documents or other written ma-
14 terial within the possession of any agency. In the case of
15 any request made pursuant to section 552 of title 5,
16 United States Code, to copy or inspect the transcripts
17 or electronic recordings described in section 201 (e),
18 the provisions of this Act shall govern whether such tran-
19 scripts or electronic recordings shall be made available in
20 accordance with such request. The requirements of chapter
21 33, of title 44, United States Code, shall not apply to the
22 transcripts and electronic recordings described in section 201
23 (e). This title does not authorize any information to be with-
24 held from Congress.

1 (b) Nothing in section 201 authorizes any agency to
2 withhold from any individual any record, including tran-
3 scripts or electronic recordings required by this Act, which
4 is otherwise accessible to that individual under section 552a
5 of title 5, United States Code.

6 SEC. 7. The provisions of this title shall become ef-
7 fective one hundred and eighty days after the date on which
8 this Act is enacted, except that the provisions of section 201
9 requiring the issuance of regulations to implement such sec-
10 tion shall become effective upon enactment.

94TH CONGRESS
1ST SESSION

H. R. 10315

IN THE HOUSE OF REPRESENTATIVES

OCTOBER 22, 1975

Ms. ABZUG (for herself and Mr. FASCELL) introduced the following bill; which was referred to the Committee on Government Operations

A BILL

To provide that meetings of Government agencies shall be open to the public, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 That this Act may be cited as the "Government in the
4 Sunshine Act".

5 SEC. 2. DECLARATION OF POLICY.—It is hereby
6 declared to be the policy of the United States that the public
7 is entitled to the fullest practicable information regarding the
8 decisionmaking processes of the Federal Government. It is
9 the purpose of this Act to provide the public with such
10 information while protecting the rights of individuals and
11 the ability of the Government to carry out its responsibilities.

1 SEC. 3. Title 5, United States Code, is amended by
2 adding after section 552a the following new section:
3 **"§ 552b. Open meetings**
4 "(a) For purposes of this section—
5 "(1) the term 'agency' means the Federal Elec-
6 tion Commission and any agency, as defined in section
7 551 (1) of this title, headed by a collegial body com-
8 posed of two or more individual members, and includes
9 any subdivision thereof composed of or including two or
10 more members and authorized to act on behalf of the
11 agency;
12 "(2) the term 'meeting' means the deliberations of
13 at least the number of individual agency members re-
14 quired to take action on behalf of the agency where
15 such deliberations concern the joint conduct or disposi-
16 tion of official agency business, but does not include
17 deliberations solely for the purpose of taking an action
18 required or permitted by this section; and
19 "(3) the term 'member' means an individual who
20 belongs to a collegial body heading an agency and who
21 is appointed to such position by the President with the
22 advice and consent of the Senate.
23 "(b) Except as provided in subsection (c), every por-
24 tion of every meeting of an agency shall be open to public
25 observation.

1 "(c) Except in a case where the agency finds that the
2 public interest requires otherwise, (1) subsection (b) shall
3 not apply to any portion of an agency meeting, and (2) the
4 requirements of subsections (d) and (e) shall not apply to
5 any information pertaining to such meeting otherwise re-
6 quired by this section to be disclosed to the public, where the
7 agency, or the subdivision thereof conducting the meeting,
8 properly determines that such portion or portions of its meet-
9 ing or the disclosure of such information, can be reasonably
10 expected to—
11 "(1) disclose matters (A) specifically authorized
12 under criteria established by an Executive order to be
13 kept secret in the interests of national defense or foreign
14 policy and (B) are in fact properly classified pursuant
15 to such Executive order;
16 "(2) relate solely to the agency's own internal per-
17 sonnel rules and practices;
18 "(3) disclose information of a personal nature where
19 disclosure would constitute a clearly unwarranted inva-
20 sion of personal privacy.
21 This paragraph shall not apply to any officer or employee
22 of the United States or any branch, department, agency or
23 establishment thereof with respect to his official duties or
24 employment;

1 "(4) involve accusing any person of a crime, or
2 formally censuring any person.
3 This paragraph shall not apply to any officer or employee
4 of the United States or any branch, department, agency, or
5 establishment thereof with respect to his official duties or
6 employment;
7 "(5) disclose information contained in investigatory
8 records compiled for law enforcement purposes, but only
9 to the extent that the disclosure would (A) interfere
10 with enforcement proceedings, (B) deprive a person
11 of a right to a fair trial or an impartial adjudication,
12 (C) constitute an unwarranted invasion of personal
13 privacy, (D) disclose the identity of a confidential
14 source, (E) in the case of a record compiled by a
15 criminal law enforcement authority in the course of a
16 criminal investigation, or by an agency conducting a
17 lawful national security intelligence investigation, dis-
18 close confidential information furnished only by the con-
19 fidential source, (F) disclose investigative techniques
20 and procedures, or (G) endanger the life or physical
21 safety of law enforcement personnel;
22 "(6) disclose trade secrets, or financial or commer-
23 cial information obtained from any person, where such
24 trade secrets or other information could not be obtained
25 by the agency without a pledge of confidentiality, or

1 where such information must be withheld from the public
2 in order to prevent substantial injury to the competitive
3 position of the person to whom such information relates;
4 "(7) disclose information which must be withheld
5 from the public in order to avoid premature disclosure of
6 an action or a proposed action by—
7 "(A) an agency which regulates currencies,
8 securities, commodities, or financial institutions
9 where such disclosure would be likely to (i) lead
10 to serious financial speculation in currencies, securi-
11 ties, or commodities, or (ii) seriously endanger the
12 stability of any financial institution; and
13 "(B) any agency where such disclosure would
14 be likely to seriously frustrate implementation of the
15 proposed agency action.
16 This paragraph shall not apply in any instance where
17 the content or nature of the proposed agency action
18 already has been disclosed to the public, or where the
19 agency is required by law to make such disclosure
20 prior to taking final agency action on such proposal;
21 "(8) disclose information contained in or related to
22 examination, operating, or condition reports prepared by,
23 on behalf of, or for the use of an agency responsible
24 for the regulation or supervision of financial institutions;

1 "(9) specifically concern the agency's participation
2 in a civil action in Federal or State court, or the initia-
3 tion, conduct, or disposition by the agency of a particular
4 case of formal agency adjudication pursuant to the proce-
5 dures in section 554 of this title, or otherwise involving
6 a determination on the record after opportunity for a
7 hearing; or
8 "(10) disclose information required to be withheld
9 from the public by any other statute establishing
10 particular criteria or referring to particular types of
11 information.
12 "(d) (1) Action under subsection (c) to close a por-
13 tion or portions of an agency meeting shall be taken only
14 when a majority of the entire membership of the agency, or
15 of the subdivision thereof authorized to conduct the meeting
16 on behalf of the agency, votes to take such action. A separate
17 vote of the agency members, or the members of a subdivision
18 thereof, shall be taken with respect to each agency meeting
19 a portion or portions of which are proposed to be closed to
20 the public pursuant to subsection (c), or with respect to any
21 information which is proposed to be withheld under sub-
22 section (c). A single vote may be taken with respect to a
23 series of meetings, a portion or portions of which are pro-
24 posed to be closed to the public, or with respect to any
25 information concerning such series of meetings, so long as

1 each meeting in such series involves the same particular mat-
2 ters, and is scheduled to be held no more than thirty days
3 after the initial meeting in such series. The vote of each
4 agency member participating in such vote shall be recorded
5 and no proxies shall be allowed. Whenever any person whose
6 interests may be directly affected by a meeting requests that
7 the agency close a portion or portions of the meeting to the
8 public for any of the reasons referred to in paragraphs (3),
9 (4), or (5) of subsection (c), the agency shall vote by
10 recorded vote whether to close such meeting, upon request
11 of any one of its members. Within one day of any vote taken
12 pursuant to this paragraph, the agency shall make publicly
13 available a written copy of such vote reflecting the vote of
14 each member on the question.

15 "(2) If a meeting or portion thereof is closed to the
16 public, the agency shall, within one day of the vote taken
17 pursuant to paragraph (1) of this subsection, make publicly
18 available a full written explanation of its action closing the
19 meeting, or portion thereof, together with a list of all persons
20 expected to attend the meeting, and their affiliation.

21 "(3) Any agency, a majority of whose meetings may
22 properly be closed to the public, in whole or in part, pursuant
23 to paragraphs (6), (7)(A), (8), or (9) of subsection
24 (c), or any combination thereof, may provide by regulation
25 for the closing of such meetings, or portion of such meetings,

1 so long as a majority of the members of the agency, or of the
2 subdivision thereof conducting the meeting, votes by recorded
3 vote at the beginning of such meeting, or portion thereof, to
4 close the exempt portion or portions of the meeting, and a
5 copy of such vote, reflecting the vote of each member on the
6 question, is made available to the public. The provisions of
7 paragraphs (1) and (2) of this subsection, and subsection
8 (e) shall not apply to any meeting to which such regulations
9 apply: *Provided*, That the agency shall, except to the extent
10 that the provisions of subsection (b) may apply, provide the
11 public with public announcement of the date, place, and
12 subject matter of the meeting at the earliest practicable
13 opportunity and in no case later than the commencement
14 of the meeting or portion in question.

15 "(e) In the case of each meeting, the agency shall make
16 public announcement, at least one week before the meeting,
17 of the date, place, and subject matter of the meeting, whether
18 open or closed to the public, and the name and phone num-
19 ber of the official designated by the agency to respond to
20 requests for information about the meeting. Such announce-
21 ment shall be made unless a majority of the members of the
22 agency, or of the members of the subdivision thereof con-
23 ducting the meeting, determines by a recorded vote that
24 agency business requires that such meetings be called at an
25 earlier date, in which case the agency shall make public

1 announcement of the date, place, and subject matter of such
2 meeting, and whether open or closed to the public, at the
3 earliest practicable opportunity and in no case later than the
4 commencement of the meeting or portion in question. The
5 subject matter of a meeting, or the determination of the
6 agency to open or close a meeting, or portion of a meeting,
7 to the public, may be changed following the public announce-
8 ment required by this paragraph if (1) a majority of the
9 entire membership of the agency, or of the subdivision
10 thereof conducting the meeting, determines by a recorded
11 vote that agency business so requires, and that no earlier
12 announcement of the change was possible, and (2) the
13 agency publicly announces such change and the vote of each
14 member upon such change at the earliest practicable oppor-
15 tunity and in no case later than the commencement of the
16 meeting or portion in question. Immediately following the
17 public announcement required by this paragraph, notice of
18 such announcement and the vote of each member upon such
19 change shall also be submitted for prompt publication in the
20 Federal Register.

21 "(f) A complete transcript or electronic recording ade-
22 quate to record fully the proceedings shall be made of each
23 meeting, or portion of a meeting, closed to the public, ex-
24 cept for a meeting, or portion of a meeting, closed to the

1 public pursuant to paragraph (9) of subsection (c). The
2 agency shall make promptly available to the public, in a
3 place easily accessible to the public, the complete transcript
4 or electronic recording of the discussion at such meeting of
5 any item on the agenda, or of the testimony of any witness
6 received at such meeting, except for such portion or portions
7 of such discussion or testimony as the agency, by recorded
8 vote taken subsequent to the meeting and promptly made
9 available to the public, determines to contain information
10 specified in paragraphs (1) through (10) of subsection (c).
11 In place of each portion deleted from such a transcript or
12 transcription the agency shall supply a written explanation
13 of the reason for the deletion, the portion of subsection (c)
14 and any other statute said to permit the deletion and a sum-
15 mary or paraphrase of the deleted portion. Such summary
16 or paraphrase need not disclose information specified in
17 paragraphs (1) through (10) of subsection (c). Copies
18 of such transcript, or a transcription of such electronic re-
19 cording disclosing the identity of each speaker, shall be fur-
20 nished to any person at no greater than the actual cost of
21 duplication or transcription or, if in the public interest, at
22 no cost. The agency shall maintain a complete verbatim
23 copy of the transcript, or a complete electronic recording of
24 each meeting, or portion of a meeting, closed to the public,

1 for a period of at least two years after such meeting,
2 or until one year after the conclusion of any agency pro-
3 ceeding with respect to which the meeting, or a portion
4 thereof, was held, whichever occurs later.

5 "(g) Each agency subject to the requirements of this
6 section shall, on or before the effective date of this Act,
7 following consultation with the Office of the Chairman of the
8 Administrative Conference of the United States and published
9 notice in the Federal Register of at least thirty days and
10 opportunity for written comment by any persons, promul-
11 gate regulations to implement the requirements of subsections
12 (b) through (f) of this section. Any person may bring a
13 proceeding in the United States District Court for the District
14 of Columbia to require an agency to promulgate such regula-
15 tions if such agency has not promulgated such regulations
16 within the time period specified herein. Any person may
17 bring a proceeding in the United States Court of Appeals
18 for the District of Columbia to set aside agency regulations
19 issued pursuant to this subsection that are not in accord
20 with the requirements of subsections (b) through (f) of
21 this section, and to require the promulgation of regulations
22 that are in accord with such subsections.

23 "(h) The district courts of the United States have juris-
24 diction to enforce the requirements of subsections (b)

1 through (f) of this section by declaratory judgment, injunc-
2 tive relief, or other relief as may be appropriate. Such actions
3 may be brought by any person against an agency or its mem-
4 bers prior to, or within sixty days after, the meeting out of
5 which the violation of this section arises, except that if public
6 announcement of such meeting is not initially provided by the
7 agency in accordance with the requirements of this section,
8 such action may be instituted pursuant to this section at any
9 time prior to sixty days after any public announcement of
10 such meeting. Before bringing such action, the plaintiff
11 shall first notify the agency of his intent to do so, and allow
12 the agency a reasonable period of time, not to exceed ten
13 days, to correct any violation of this section, except that
14 such reasonable period of time shall not be held to exceed
15 two working days where notification of such violation is
16 made prior to a meeting which the agency has voted to close.
17 Such actions may be brought in the district wherein the
18 plaintiff resides, or has his principal place of business, or
19 where the agency in question has its headquarters. In such
20 actions a defendant shall serve his answer within twenty days
21 after the service of the complaint. The burden is on the
22 defendant to sustain his action. In deciding such cases the
23 court may examine in camera any portion of a transcript or
24 electronic recording of a meeting closed to the public, and
25 may take such additional evidence as it deems necessary. The

1 court, having due regard for orderly administration and the
2 public interest, as well as the interests of the party, may
3 grant such equitable relief as it deems appropriate, includ-
4 ing granting an injunction against future violations of this
5 section, or ordering the agency to make available to the pub-
6 lic the transcript or electronic recording of any portion of a
7 meeting improperly closed to the public. Except to the extent
8 provided in subsection (i) of this section, nothing in this sec-
9 tion confers jurisdiction on any district court acting solely
10 under this subsection to set aside or invalidate any agency
11 action taken or discussed at an agency meeting out of which
12 the violation of this section arose.

13 "(i) Any Federal court otherwise authorized by law to
14 review agency action may, at the application of any person
15 entitled to seek such review, inquire into violations by the
16 agency of the requirements of this section and afford any
17 such relief as it deems appropriate.

18 "(j) The court may assess against any party reason-
19 able attorney fees and other litigation costs reasonably in-
20 curred by any other party who substantially prevails in any
21 action brought in accordance with the provisions of sub-
22 section (g), (h), or (i) of this section, except that costs
23 may be assessed against an individual member of an agency
24 only in the case where the court finds such agency member
25 has intentionally and repeatedly violated this section and

1 against the plaintiff only where the court finds that the suit
2 was initiated by the plaintiff primarily for frivolous or
3 dilatory purposes. In the case of assessment of costs against
4 an agency, the costs may be assessed by the court against
5 the United States.

6 "(k) Each agency subject to the requirements of this
7 section shall annually report to Congress regarding its com-
8 pliance with such requirements, including a tabulation of
9 the total number of agency meetings open to the public,
10 the total number of meetings closed to the public, the rea-
11 sons for closing such meetings, and a description of any
12 litigation brought against the agency under this section,
13 including any costs assessed against the agency in such
14 litigation (whether paid by the agency or otherwise).

15 "(l) Except as specifically provided in this section,
16 nothing herein confers any additional rights on any person,
17 or limits the present right of any person, to inspect or copy,
18 under section 552 of this title, any documents or other written
19 material in the possession of any agency. In the case of any
20 request made pursuant to section 552 of this title to copy
21 or inspect the transcripts or electronic recordings described
22 in subsection (f) of this section, the provisions of this Act
23 shall govern whether such transcripts or recordings shall be
24 made available in accordance with such request. The require-
25 ments of chapter 33 of title 44, United States Code, shall not

80-459 O - 77 - 29

1 apply to the transcripts and electronic recordings described in
2 subsection (f) of this section.
3 "(m) This section does not constitute authority to with-
4 hold any information from Congress, and does not authorize
5 the closing of any agency meeting otherwise required by
6 law to be open.
7 "(n) Nothing in this section authorizes any agency
8 to withhold from any individual any record, including tran-
9 scripts or electronic recordings required by this Act, which
10 is otherwise accessible to such individual under section 552a
11 of this title.".
12 SEC. 4. The chapter analysis of chapter 5 of title 5,
13 United States Code, is amended by inserting:

"552b. Open meetings."

14 immediately below:

"552a. Records about individuals.".

15 SEC. 5. (a) Section 557 of title 5, United States Code,
16 is amended by adding at the end thereof the following new
17 subsection:
18 "(d) (1) In any agency proceeding which is subject
19 to subsection (a) of this section, except to the extent
20 required for the disposition of ex parte matters as authorized
21 by law—
22 "(A) no person outside the agency shall make or
23 cause to be made to any member of the body com-

1 prising the agency, administrative law judge, or other
2 employee who is or may reasonably be expected to
3 be involved in the decisional process of the proceeding,
4 an ex parte communication relative to the merits of the
5 proceeding;

6 "(B) no member of the body comprising the agen-
7 cy, administrative law judge, or other employee who
8 is or may reasonably be expected to be involved in
9 the decisional process of the proceeding, shall make or
10 cause to be made to any person outside the agency an
11 ex parte communication relative to the merits of the
12 proceeding;

13 "(C) a member of the body comprising the agency,
14 administrative law judge, or other employee who is or
15 may reasonably be expected to be involved in the de-
16 cisional process of such proceeding who receives, or
17 who makes, a communication prohibited by this subsec-
18 tion shall place on the public record of the proceeding:

19 "(i) all such written communications;

20 "(ii) memoranda stating the substance of all
21 such oral communications; and

22 "(iii) all written responses and memoranda
23 stating the substance of all oral responses to the
24 materials described in clauses (i) and (ii) of this
25 subparagraph;

1 "(D) in the event of a communication prohibited
2 by this subsection and made or caused to be made by a
3 party, the agency, administrative law judge, or other
4 employee presiding at the hearing may, to the extent
5 consistent with the interests of justice and the policy of
6 the underlying statutes, require the person or party to
7 show cause why his claim or interest in the proceeding
8 should not be dismissed, denied, disregarded, or other-
9 wise adversely affected on account of such violation;
10 "(E) the prohibitions of this subsection shall apply
11 beginning at such time as the agency may designate, but
12 in no case shall they begin to apply later than the time
13 at which a proceeding is noticed for hearing unless the
14 person responsible for the communication has knowledge
15 that it will be noticed, in which case the prohibitions
16 shall apply beginning at the time of his acquisition of
17 such knowledge.
18 "(2) This section does not constitute authority to with-
19 hold information from Congress.
20 "(3) Subparagraphs (A) and (B) of paragraph (1)
21 are not intended to prohibit inquiries or responses relating
22 solely to the procedural status of a matter pending before an
23 agency: *Provided*, That any such inquiry or response shall
24 be placed on the public record pursuant to subparagraph (C)
25 of paragraph (1)."

1 (b) The second sentence of section 554 (d) of title 5,
2 United States Code, is amended to read as follows: "Such
3 employee may not be responsible to or subject to the super-
4 vision or direction of an employee or agent engaged in the
5 performance of investigative or prosecuting functions for an
6 agency.".

7 (c) Section 551 of title 5, United States Code, is
8 amended—

9 (1) by striking out "and" at the end of paragraph
10 (12);

11 (2) by striking out the "act." at the end of para-
12 graph (13) and inserting in lieu thereof "act; and";
13 and

14 (3) by adding at the end thereof the following new
15 paragraph:

16 "(14) 'ex parte communication' means an oral or
17 written communication not on the public record with
18 respect to which reasonable prior notice to all parties is
19 not given.".

20 (d) Section 556 (d) of title 5, United States Code, is
21 amended by inserting between the third and fourth sentences
22 thereof the following new sentence: "The agency may, to the
23 extent consistent with the interests of justice and the policy
24 of the underlying statutes administered by the agency, con-
25 sider a violation of section 557 (d) of this title sufficient

1 grounds for a decision adverse to a party who has knowingly
2 committed such violation or knowingly caused such violation
3 to occur.".

4 SEC. 6. The provisions of this Act shall become effective
5 one hundred and eighty days after the date of its enactment.

94TH CONGRESS
1ST SESSION

H. R. 11007

IN THE HOUSE OF REPRESENTATIVES

DECEMBER 4, 1975

Ms. ABZUG (for herself, Mr. FASCELL, Mr. BROOKS, Mr. CONYERS, Mr. HARRINGTON, Mr. MACDONALD of Massachusetts, Mr. MCCLOSKEY, Mr. MAGUIRE, Mr. MOFFETT, Mr. MOSS, and Mr. RYAN) introduced the following bill; which was referred to the Committee on Government Operations

A BILL

To provide that meetings of Government agencies shall be open to the public, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 That this Act may be cited as the "Government in the Sun-
4 shine Act".

5 SEC. 2. DECLARATION OF POLICY.—It is hereby de-
6 clared to be the policy of the United States that the public
7 is entitled to the fullest practicable information regarding
8 the decisionmaking processes of the Federal Government. It
9 is the purpose of this Act to provide the public with such

1 information while protecting the rights of individuals and
2 the ability of the Government to carry out its responsibilities.
3 SEC. 3. Title 5, United States Code, is amended by
4 adding after section 552a the following new section:
5 **"§ 552b. Open meetings**
6 "(a) For purposes of this section—
7 "(1) the term 'agency' means the Federal Elec-
8 tion Commission and any agency, as defined in section
9 552(e) of this title, headed by a collegial body com-
10 posed of two or more individual members, and includes
11 any subdivision thereof composed of or including two or
12 more members and authorized to act on behalf of the
13 agency;
14 "(2) the term 'meeting' means the deliberations of
15 at least the number of individual agency members re-
16 quired to take action on behalf of the agency where
17 such deliberations concern the joint conduct or disposi-
18 tion of agency business; and
19 "(3) the term 'member' means an individual who
20 belongs to a collegial body heading an agency and who
21 is appointed to such position by the President with the
22 advice and consent of the Senate.
23 "(b) Except as provided in subsection (c), every por-
24 tion of every meeting of an agency shall be open to public
25 observation.

1 "(c) Except in a case where the agency finds that the
2 public interest requires otherwise, (1) subsection (b) shall
3 not apply to any portion of an agency meeting, and (2) the
4 requirements of subsections (d) and (e) shall not apply to
5 any information pertaining to such meeting otherwise re-
6 quired by this section to be disclosed to the public, where the
7 agency properly determines that such portion or portions of
8 its meeting or the disclosure of such information is likely to—
9 "(1) disclose matters (A) specifically authorized
10 under criteria established by an Executive order to be
11 kept secret in the interests of national defense or foreign
12 policy and (B) are, in fact, properly classified pursuant
13 to such Executive order;
14 "(2) relate solely to the agency's own internal per-
15 sonnel rules and practices;
16 "(3) disclose information of a personal nature where
17 disclosure would constitute a clearly unwarranted inva-
18 sion of personal privacy.
19 This paragraph shall not apply to any officer or employee
20 of the United States or any branch, department, agency or
21 establishment thereof with respect to his official duties or
22 employment;
23 "(4) involve accusing any person of a crime, or
24 formally censuring any person.
25 This paragraph shall not apply to any officer or employee

1 of the United States or any branch, department, agency, or
2 establishment thereof with respect to his official duties or
3 employment;

4 "(5) disclose information contained in investigatory
5 records compiled for law enforcement purposes, but only
6 to the extent that the disclosure would (A) interfere
7 with enforcement proceedings, (B) deprive a person
8 of a right to a fair trial or an impartial adjudication,
9 (C) constitute an unwarranted invasion of personal
10 privacy, (D) disclose the identity of a confidential
11 source, (E) in the case of a record compiled by a
12 criminal law enforcement authority in the cause of a
13 criminal investigation, or by an agency conducting a
14 lawful national security intelligence investigation, dis-
15 close confidential information furnished only by the con-
16 fidential source, (F) disclose investigative techniques
17 and procedures, or (G) endanger the life or physical
18 safety of law enforcement personnel;

19 "(6) disclose trade secrets, or financial or commer-
20 cial information obtained from any person, where such
21 trade secrets or other information could not be obtained
22 by the agency without a pledge of confidentiality, or
23 where such information must be withheld from the public
24 in order to prevent substantial injury to the competitive
25 position of the person to whom such information relates;

1 "(7) disclose information which must be withheld
2 from the public in order to avoid untimely disclosure of
3 an action or a proposed action by—
4 "(A) an agency which regulates currencies,
5 securities, commodities, or financial institutions
6 where such disclosure would be likely to (i) lead
7 to serious financial speculation in currencies, securi-
8 ties, or commodities, or (ii) seriously endanger the
9 stability of any financial institution; and
10 "(B) any agency where such disclosure would
11 be likely to seriously frustrate implementation of the
12 proposed agency action.
13 This paragraph shall not apply in any instance where
14 the content or nature of the proposed agency action
15 already has been disclosed to the public, or where the
16 agency is required by law to make such disclosure
17 prior to taking final agency action on such proposal;
18 "(8) disclose information contained in or related to
19 examination, operating, or condition reports prepared by,
20 on behalf of, or for the use of an agency responsible
21 for the regulation or supervision of financial institutions;
22 "(9) specifically concern the agency's participation
23 in a civil action in Federal or State court, or the initia-
24 tion, conduct, or disposition by the agency of a particular
25 case of formal agency adjudication pursuant to the proce-

1 dures in section 554 of this title or otherwise involving
2 a determination on the record after opportunity for a
3 hearing; or
4 "(10) disclose information required to be withheld
5 from the public by any other statute establishing
6 particular criteria or referring to particular types of
7 information.
8 "(d) (1) Action under subsection (c) to close a por-
9 tion or portions of an agency meeting shall be taken only
10 when a majority of the entire membership of the agency
11 votes to take such action. A separate vote of the agency
12 members shall be taken with respect to each agency meeting
13 a portion or portions of which are proposed to be closed to
14 the public pursuant to subsection (c), or with respect to any
15 information which is proposed to be withheld under sub-
16 section (c). A single vote may be taken with respect to a
17 series of portions of meetings which are proposed to be
18 closed to the public, or with respect to any information con-
19 cerning such series, so long as each portion of a meeting
20 in such series involves the same particular matters, and is
21 scheduled to be held no more than thirty days after the
22 initial portion of a meeting in such series. The vote of each
23 agency member participating in such vote shall be recorded
24 and no proxies shall be allowed. Whenever any person whose
25 interests may be directly affected by a portion of a meeting

1 requests that the agency close such portion to the public for
2 any of the reasons referred to in paragraphs (3), (4), or
3 (5) of subsection (c), the agency shall vote by recorded
4 vote whether to close such meeting, upon request of any one
5 of its members. Within one day of any vote taken pursuant
6 to this paragraph, the agency shall make publicly available
7 a written copy of such vote reflecting the vote of each
8 member on the question.

9 "(2) If a portion of a meeting is closed to the public,
10 the agency shall, within one day of the vote taken pursuant
11 to paragraph (1) of this subsection, make publicly avail-
12 able a full written explanation of its action closing the por-
13 tion together with a list of all persons expected to attend
14 the meeting, and their affiliation.

15 "(3) Any agency, a majority of the portions of whose
16 meetings may properly be closed to the public pursuant
17 to paragraphs (6), (7) (A), (8), or (9) of subsection
18 (c), or any combination thereof, may provide by regulation
19 for the closing of such portions in the event that a majority
20 of the members of the agency votes by recorded vote at the
21 beginning of such meeting, or portion thereof, to close the
22 exempt portion or portions of the meeting, and a copy of
23 such vote, reflecting the vote of each member on the ques-
24 tion, is made available to the public. The provisions of
25 paragraphs (1) and (2) of this subsection and subsection

1 (e) shall not apply to any portion of a meeting to which
2 such regulations apply: *Provided*, That the agency shall,
3 except to the extent that such information is exempt from
4 disclosure under the provisions of subsection (c), provide
5 the public with public announcement of the date, place, and
6 subject matter of the meeting and each portion thereof at
7 the earliest practicable time and in no case later than the
8 commencement of the meeting or portion in question.

9 "(e) In the case of each meeting, the agency shall make
10 public announcement, at least one week before the meeting,
11 of the date, place, and subject matter of the meeting, whether
12 it is to be open or closed to the public, and the name and
13 phone number of the official designated by the agency to
14 respond to requests for information about the meeting. Such
15 announcement shall be made unless a majority of the mem-
16 bers of the agency determines by a recorded vote that agency
17 business requires that such meetings be called at an earlier
18 date, in which case the agency shall make public announce-
19 ment of the date, place, and subject matter of such meeting,
20 and whether open or closed to the public, at the earliest
21 practicable time and in no case later than the commence-
22 ment of the meeting or portion in question. The time, place,
23 or subject matter of a meeting, or the determination of the
24 agency to open or close a meeting, or portion of a meeting,
25 to the public, may be changed following the public announce-

1 ment required by this paragraph only if (1) a majority of
2 the entire membership of the agency determines by a re-
3 corded vote that agency business so requires and that no
4 earlier announcement of the change was possible, and (2)
5 the agency publicly announces such change and the vote
6 of each member upon such change at the earliest practicable
7 time and in no case later than the commencement of the
8 meeting or portion in question.

9 "(f) (1) A complete transcript or electronic recording
10 adequate to record fully the proceedings shall be made of each
11 meeting, or portion of a meeting, closed to the public, ex-
12 cept for a meeting, or portion of a meeting, closed to the
13 public pursuant to paragraph (9) of subsection (c). The
14 agency shall make promptly available to the public, in a
15 location easily accessible to the public, the complete transcript
16 or electronic recording of the discussion at such meeting of
17 any item on the agenda, or of the testimony of any witness
18 received at such meeting, except for such portion or portions
19 of such discussion or testimony as the agency, by recorded
20 vote taken subsequent to the meeting and promptly made
21 available to the public, determines to contain information
22 specified in paragraphs (1) through (10) of subsection (c).
23 In place of each portion deleted from such a transcript or
24 transcription the agency shall supply a written explanation
25 of the reason for the deletion, the portion of subsection (c)

1 and any other statute said to permit the deletion and a sum-
2 mary or paraphrase of the deleted portion. Such summary
3 or paraphrase need not disclose information specified in
4 paragraphs (1) through (10) of subsection (c). Copies
5 of such transcript, or a transcription of such electronic re-
6 cording disclosing the identity of each speaker, shall be fur-
7 nished to any person at no greater than the actual cost of
8 duplication or transcription or, if in the public interest, at
9 no cost. The agency shall maintain a complete verbatim
10 copy of the transcript, or a complete electronic recording of
11 each meeting, or portion of a meeting, closed to the public,
12 for a period of at least two years after such meeting,
13 or until one year after the conclusion of any agency pro-
14 ceeding with respect to which the meeting, or a portion
15 thereof, was held, whichever occurs later.

16 "(2) Written minutes shall be made of any agency meet-
17 ing, or portion thereof, which is open to the public. The
18 agency shall make such minutes promptly available to the
19 public in a location easily accessible to the public, and shall
20 maintain such minutes for a period of at least two years after
21 such meeting. Copies of such minutes shall be furnished to
22 any person without charge.

23 "(g) Each agency subject to the requirements of this
24 section shall, on or before the effective date of this Act,
25 following consultation with the Office of the Chairman of the

1 Administrative Conference of the United States and published
2 notice in the Federal Register of at least thirty days and
3 opportunity for written comment by any persons, promul-
4 gate regulations to implement the requirements of subsections
5 (b) through (f) of this section. Any person may bring a
6 proceeding in the United States District Court for the District
7 of Columbia to require an agency to promulgate such regula-
8 tions if such agency has not promulgated such regulations
9 within the time period specified herein. Any person may
10 bring a proceeding in the United States Court of Appeals
11 for the District of Columbia to set aside agency regulations
12 issued pursuant to this subsection that are not in accord
13 with the requirements of subsections (b) through (f) of
14 this section, and to require the promulgation of regulations
15 that are in accord with such subsections.

16 "(h) The district courts of the United States have juris-
17 diction to enforce the requirements of subsections (b)
18 through (f) of this section by declaratory judgment, injunc-
19 tive relief, or other relief as may be appropriate. Such actions
20 may be brought by any person against an agency or its mem-
21 bers prior to, or within sixty days after, the meeting out of
22 which the violation of this section arises, except that if public
23 announcement of such meeting is not initially provided by the
24 agency in accordance with the requirements of this section,
25 such action may be instituted pursuant to this section at any

80-459 O - 77 - 30

1 time prior to sixty days after any public announcement of
2 such meeting. Before bringing such action, the plaintiff
3 shall first notify the agency of his intent to do so, and allow
4 the agency a reasonable period of time, not to exceed ten
5 days, to correct any violation of this section, except that
6 such reasonable period of time shall not be held to exceed
7 two working days where notification of such violation is
8 made prior to a meeting which the agency has voted to close.
9 Such actions may be brought in the district wherein the
10 plaintiff resides, or has his principal place of business, or
11 where the agency in question has its headquarters. In such
12 actions a defendant shall serve his answer within twenty days
13 after the service of the complaint. The burden is on the
14 defendant to sustain his action. In deciding such cases the
15 court may examine in camera any portion of a transcript or
16 electronic recording of a meeting closed to the public, and
17 may take such additional evidence as it deems necessary. The
18 court, having due regard for orderly administration and the
19 public interest, as well as the interests of the party, may
20 grant such equitable relief as it deems appropriate, includ-
21 ing granting an injunction against future violations of this
22 section, or ordering the agency to make available to the pub-
23 lic the transcript or electronic recording of any portion of a
24 meeting improperly closed to the public. Except to the extent
25 provided in subsection (i) of this section, nothing in this sec-

1 tion confers jurisdiction on any district court acting solely
2 under this subsection to set aside, enjoin or invalidate any
3 agency action taken or discussed at an agency meeting out
4 of which the violation of this section arose.

5 "(i) Any Federal court otherwise authorized by law to
6 review agency action may, at the application of any person
7 properly participating in the judicial review proceeding, in-
8 quire into violations by the agency of the requirements
9 of this section and afford any such relief as it deems
10 appropriate.

11 "(j) The court may assess against any party reason-
12 able attorney fees and other litigation costs reasonably in-
13 curred by any other party who substantially prevails in any
14 action brought in accordance with the provisions of sub-
15 section (g), (h), or (i) of this section, except that costs
16 may be assessed against an individual member of an agency
17 only in the case where the court finds such agency member
18 has intentionally and repeatedly violated this section and
19 against the plaintiff only where the court finds that the suit
20 was initiated by the plaintiff primarily for frivolous or dila-
21 tory purposes. In the case of assessment of costs against an
22 agency, the costs may be assessed by the court against the
23 United States.

24 "(k) Each agency subject to the requirements of this
25 section shall annually report to Congress regarding its com-

1 pliance with such requirements, including a tabulation of
2 the total number of agency meetings open to the public,
3 the total number of meetings closed to the public, the rea-
4 sons for closing such meetings, and a description of any
5 litigation brought against the agency under this section,
6 including any costs assessed against the agency in such
7 litigation (whether or not paid by the agency).

8 "(l) Except as specifically provided in this section,
9 nothing herein expands or limits the present rights of any
10 person under section 552 of this title, except that the pro-
11 visions of this Act shall govern in the case of any request
12 made pursuant to such section to copy or inspect the tran-
13 scripts or electronic recordings described in subsection (f)
14 of this section. The requirements of chapter 33 of title 44,
15 United States Code, shall not apply to the transcripts and
16 electronic recordings described in subsection (f) of this
17 section.

18 "(m) This section does not constitute authority to with-
19 hold any information from Congress, and does not authorize
20 the closing of any agency meeting or portion thereof other-
21 wise required by law to be open.

22 "(n) Nothing in this section authorizes any agency
23 to withhold from any individual any record, including tran-
24 scripts or electronic recordings required by this Act, which

1 is otherwise accessible to such individual under section 552a
2 of this title.".
3 SEC. 4. The chapter analysis of chapter 5 of title 5,
4 United States Code, is amended by inserting:
"552b. Open meetings."
5 immediately below:
"552a. Records about individuals.".
6 SEC. 5. (a) Section 557 of title 5, United States Code,
7 is amended by adding at the end thereof the following new
8 subsection:
9 "(d) (1) In any agency proceeding which is subject
10 to subsection (a) of this section, except to the extent
11 required for the disposition of ex parte matters as authorized
12 by law—
13 "(A) no person outside the agency shall make or
14 cause to be made to any member of the body com-
15 prising the agency, administrative law judge, or other
16 employee who is or may reasonably be expected to
17 be involved in the decisional process of the proceeding,
18 an ex parte communication relative to the merits of the
19 proceeding;
20 "(B) no member of the body comprising the agen-
21 cy, administrative law judge, or other employee who
22 is or may reasonably be expected to be involved in

1 the decisional process of the proceeding, shall make or
2 cause to be made to any person outside the agency an
3 ex parte communication relative to the merits of the
4 proceeding;

5 "(C) a member of the body comprising the agency,
6 administrative law judge, or other employee who is or
7 may reasonably be expected to be involved in the de-
8 cisional process of such proceeding who receives, or
9 who makes or causes to be made, a communication pro-
10 hibited by this subsection shall place on the public record
11 of the proceeding:

12 "(i) all such written communications;

13 "(ii) memoranda stating the substance of all
14 such oral communications; and

15 "(iii) all written responses, and memoranda
16 stating the substance of all oral responses, to the
17 materials described in clauses (i) and (ii) of this
18 subparagraph;

19 "(D) in the event of a communication prohibited
20 by this subsection and made or caused to be made by a
21 party, the agency, administrative law judge, or other
22 employee presiding at the hearing may, to the extent
23 consistent with the interests of justice and the policy of
24 the underlying statutes, require the person or party to
25 show cause why his claim or interest in the proceeding

1 should not be dismissed, denied, disregarded, or other-
2 wise adversely affected on account of such violation;
3 and
4 "(E) the prohibitions of this subsection shall apply
5 beginning at such time as the agency may designate, but
6 in no case shall they begin to apply later than the time
7 at which a proceeding is noticed for hearing unless the
8 person responsible for the communication has knowledge
9 that it will be noticed, in which case the prohibitions
10 shall apply beginning at the time of his acquisition of
11 such knowledge.
12 "(2) This section does not constitute authority to with-
13 hold information from Congress.".
14 (b) Section 551 of title 5, United States Code, is
15 amended—
16 (1) by striking out "and" at the end of paragraph
17 (12);
18 (2) by striking out the "act." at the end of para-
19 graph (13) and inserting in lieu thereof "act; and";
20 and
21 (3) by adding at the end thereof the following new
22 paragraph:
23 "(14) 'ex parte communication' means an oral or
24 written communication not on the public record with

1 respect to which reasonable prior notice to all parties is
2 not given.".
3 (c) Section 556(d) of title 5, United States Code, is
4 amended by inserting between the third and fourth sentences
5 thereof the following new sentence: "The agency may, to the
6 extent consistent with the interests of justice and the policy
7 of the underlying statutes administered by the agency, con-
8 sider a violation of section 557(d) of this title sufficient
9 grounds for a decision adverse to a person or party who has
10 committed such violation or caused such violation to occur.".
11 SEC. 6. The provisions of this Act shall become effective
12 one hundred and eighty days after the date of its enactment.

94TH CONGRESS
2D SESSION

H. R. 11656

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 3, 1976

Ms. ABZUG (for herself, Mr. FASCELL, Mr. BROOKS, Mr. MOSS, Mr. MACDONALD of Massachusetts, Mr. MOORHEAD of Pennsylvania, Mr. ROSENTHAL, Mr. WRIGHT, Mr. FUQUA, Mr. CONYERS, Mr. JAMES V. STANTON, Ms. COLLINS of Illinois, Mr. JOHN L. BURTON, Mr. HARRINGTON, Mr. DRINAN, Mr. MEZVINSKY, Ms. JORDAN, Mr. EVANS of Indiana, Mr. MOFFETT, Mr. MAGUIRE, Mr. ASPIN, Mr. GUDE, Mr. MCCLOSKEY, Mr. STEELMAN, and Mr. PRITCHARD) introduced the following bill; which was referred to the Committee on Government Operations

A BILL

To provide that meetings of Government agencies shall be open to the public, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 That this Act may be cited as the "Government in the Sun-
4 shine Act".

5 DECLARATION OF POLICY

6 SEC. 2. It is hereby declared to be the policy of the
7 United States that the public is entitled to the fullest prac-
8 ticable information regarding the decisionmaking processes

1 of the Federal Government. It is the purpose of this Act to
2 provide the public with such information while protecting
3 the rights of individuals and the ability of the Government to
4 carry out its responsibilities.

5 OPEN MEETINGS

6 SEC. 3. (a) Title 5, United States Code, is amended by
7 adding after section 552a the following new section:

8 **"§ 552b. Open meetings**

9 "(a) For purposes of this section—

10 "(1) the term 'agency' means the Federal Election
11 Commission and any agency, as defined in section 552
12 (e) of this title, headed by a collegial body composed of
13 two or more individual members, a majority of whom
14 are appointed to such position by the President with
15 the advice and consent of the Senate, and includes any
16 subdivision thereof authorized to act on behalf of the
17 agency;

18 "(2) the term 'meeting' means the deliberations of
19 at least the number of individual agency members re-
20 quired to take action on behalf of the agency where such
21 deliberations concern the joint conduct or disposition of
22 agency business; and

23 "(3) the term 'member' means an individual who
24 belongs to a collegial body heading an agency.

25 "(b) Except as provided in subsection (c), every por-

1 tion of every meeting of an agency shall be open to public
2 observation.
3 "(c) Except in a case where the agency finds that the
4 public interest requires otherwise, subsection (b) shall
5 not apply to any portion of an agency meeting and the
6 requirements of subsections (d) and (e) shall not apply to
7 any information pertaining to such meeting otherwise re-
8 quired by this section to be disclosed to the public, where the
9 agency properly determines that such portion or portions of
10 its meeting or the disclosure of such information is likely to—
11 "(1) disclose matters (A) specifically authorized
12 under criteria established by an Executive order to be
13 kept secret in the interests of national defense or foreign
14 policy and (B) in fact properly classified pursuant to
15 such Executive order;
16 "(2) relate solely to the internal personnel rules
17 and practices of an agency;
18 "(3) disclose information required to be withheld
19 from the public by any statute establishing particular
20 criteria or referring to particular types of information;
21 "(4) disclose trade secrets and commercial or finan-
22 cial information obtained from a person and privileged or
23 confidential;
24 "(5) involve accusing any person of a crime, or
25 formally censuring any person;

1 "(6) disclose information of a personal nature
2 where disclosure would constitute a clearly unwarranted
3 invasion of personal privacy;
4 "(7) disclose investigatory records compiled for
5 law enforcement purposes, but only to the extent that
6 the production of such records would (A) interfere with
7 enforcement proceedings, (B) deprive a person of a
8 right to a fair trial or an impartial adjudication, (C)
9 constitute an unwarranted invasion of personal privacy,
10 (D) disclose the identity of a confidential source and,
11 in the case of a record compiled by a criminal law en-
12 forcement authority in the course of a criminal investi-
13 gation, or by an agency conducting a lawful national
14 security intelligence investigation, confidential informa-
15 tion furnished only by the confidential source, (E) dis-
16 close investigative techniques and procedures, or (F)
17 endanger the life or physical safety of law enforcement
18 personnel;
19 "(8) disclose information contained in or related to
20 examination, operating, or condition reports prepared
21 by, on behalf of, or for the use of an agency responsible
22 for the regulation or supervision of financial institutions;
23 "(9) disclose information the premature disclosure
24 of which would—
25 "(A) in the case of an agency which regulates

1 currencies, securities, commodities, or financial in-
2 stitutions, be likely to (i) lead to significant financial
3 speculation, or (ii) significantly endanger the sta-
4 bility of any financial institution; or
5 "(B) in the case of any agency, be likely to
6 significantly frustrate implementation of a proposed
7 agency action, except that this subparagraph shall
8 not apply in any instance where the content or na-
9 ture of the proposed agency action already has been
10 disclosed to the public by the agency, or where the
11 agency is required by law to make such disclosure
12 prior to taking final agency action on such proposal;
13 or
14 "(10) specifically concern the agency's issuance
15 of a subpena, or the agency's participation in a civil
16 action, an action in a foreign court or international tri-
17 bunal, or an arbitration, or the initiation, conduct, or
18 disposition by the agency of a particular case of formal
19 agency adjudication pursuant to the procedures in section
20 554 of this title or otherwise involving a determination
21 on the record after opportunity for a hearing.
22 "(d) (1) Action under subsection (c) to close a por-
23 tion or portions of an agency meeting shall be taken only
24 when a majority of the entire membership of the agency
25 votes to take such action. A separate vote of the agency

1 members shall be taken with respect to each agency meeting
2 a portion or portions of which are proposed to be closed to
3 the public pursuant to subsection (c), or with respect to any
4 information which is proposed to be withheld under sub-
5 section (c). A single vote may be taken with respect to a
6 series of portions of meetings which are proposed to be
7 closed to the public, or with respect to any information con-
8 cerning such series, so long as each portion of a meeting
9 in such series involves the same particular matters, and is
10 scheduled to be held no more than thirty days after the
11 initial portion of a meeting in such series. The vote of each
12 agency member participating in such vote shall be recorded
13 and no proxies shall be allowed.
14 "(2) Whenever any person whose interests may be
15 directly affected by a portion of a meeting requests that the
16 agency close such portion to the public for any of the rea-
17 sons referred to in paragraph (5), (6), or (7) of subsec-
18 tion (c), the agency, upon request of any one of its members,
19 shall vote by recorded vote whether to close such meeting.
20 "(3) Within one day of any vote taken pursuant to
21 paragraph (1) or (2), the agency shall make publicly
22 available a written copy of such vote reflecting the vote of
23 each member on the question. If a portion of a meeting is
24 closed to the public, the agency shall, within one day of the
25 vote taken pursuant to paragraph (1) or (2) of this sub-

1 section, make publicly available a full written explanation
2 of its action closing the portion together with a list of all
3 persons expected to attend the meeting and their affiliation.
4 "(4) Any agency, a majority of the portions of whose
5 meetings may properly be closed to the public pursuant
6 to paragraph (4), (8), (9) (A), or (10) of subsection
7 (c), or any combination thereof, may provide by regulation
8 for the closing of such portions in the event that a majority
9 of the members of the agency votes by recorded vote at the
10 beginning of such meeting, or portion thereof, to close the
11 exempt portion or portions of the meeting, and a copy of
12 such vote, reflecting the vote of each member on the ques-
13 tion, is made available to the public. The provisions of
14 paragraphs (1), (2), and (3) of this subsection and subsec-
15 tion (e) shall not apply to any portion of a meeting to which
16 such regulations apply: *Provided*, That the agency shall,
17 except to the extent that such information is exempt from
18 disclosure under the provisions of subsection (c), provide
19 the public with public announcement of the date, place, and
20 subject matter of the meeting and each portion thereof at
21 the earliest practicable time and in no case later than the
22 commencement of the meeting or portion in question.
23 "(e) In the case of each meeting, the agency shall make
24 public announcement, at least one week before the meeting,
25 of the date, place, and subject matter of the meeting, whether

1 it is to be open or closed to the public, and the name and
2 phone number of the official designated by the agency to
3 respond to requests for information about the meeting. Such
4 announcement shall be made unless a majority of the mem-
5 bers of the agency determines by a recorded vote that agency
6 business requires that such meeting be called at an earlier
7 date, in which case the agency shall make public announce-
8 ment of the date, place, and subject matter of such meeting,
9 and whether open or closed to the public, at the earliest
10 practicable time and in no case later than the commence-
11 ment of the meeting or portion in question. The time, place,
12 or subject matter of a meeting, or the determination of the
13 agency to open or close a meeting, or portion of a meeting,
14 to the public, may be changed following the public announce-
15 ment required by this paragraph only if (1) a majority of
16 the entire membership of the agency determines by a re-
17 corded vote that agency business so requires and that no
18 earlier announcement of the change was possible, and (2)
19 the agency publicly announces such change and the vote
20 of each member upon such change at the earliest practicable
21 time and in no case later than the commencement of the
22 meeting or portion in question.

23 "(f) (1) A complete transcript or electronic recording
24 adequate to record fully the proceedings shall be made of each
25 meeting, or portion of a meeting, closed to the public, ex-

1 cept for a meeting, or portion of a meeting, closed to the
2 public pursuant to paragraph (10) of subsection (c). The
3 agency shall make promptly available to the public, in a
4 location easily accessible to the public, the complete transcript
5 or electronic recording of the discussion at such meeting of
6 any item on the agenda, or of the testimony of any witness
7 received at such meeting, except for such portion or portions
8 of such discussion or testimony as the agency, by recorded
9 vote taken subsequent to the meeting and promptly made
10 available to the public, determines to contain information
11 specified in paragraphs (1) through (10) of subsection (c).
12 In place of each portion deleted from such a transcript or
13 transcription the agency shall supply a written explanation
14 of the reason for the deletion, and the portion of subsection
15 (c) and any other statute said to permit the deletion. Copies
16 of such transcript, or a transcription of such electronic re-
17 cording disclosing the identity of each speaker, shall be fur-
18 nished to any person at no greater than the actual cost of
19 duplication or transcription or, if in the public interest, at
20 no cost. The agency shall maintain a complete verbatim
21 copy of the transcript, or a complete electronic recording of
22 each meeting, or portion of a meeting, closed to the public,
23 for a period of at least two years after such meeting,
24 or until one year after the conclusion of any agency pro-

80-459 O - 77 - 31

1 ceeding with respect to which the meeting, or a portion
2 thereof, was held, whichever occurs later.
3 "(2) Written minutes shall be made of any agency meet-
4 ing, or portion thereof, which is open to the public. The
5 agency shall make such minutes promptly available to the
6 public in a location easily accessible to the public, and shall
7 maintain such minutes for a period of at least two years after
8 such meeting. Copies of such minutes shall be furnished to
9 any person at no greater than the actual cost of duplication
10 thereof or, if in the public interest, at no cost.
11 "(g) Each agency subject to the requirements of this
12 section shall, within 180 days after the date of enactment
13 of this section, following consultation with the Office of the
14 Chairman of the Administrative Conference of the United
15 States and published notice in the Federal Register of at
16 least thirty days and opportunity for written comment by
17 any persons, promulgate regulations to implement the re-
18 quirements of subsections (b) through (f) of this section.
19 Any person may bring a proceeding in the United States
20 District Court for the District of Columbia to require an
21 agency to promulgate such regulations if such agency has
22 not promulgated such regulations within the time period
23 specified herein. Subject to any limitations of time therefor
24 provided by law, any person may bring a proceeding in
25 the United States Court of Appeals for the District of Colum-

1 bia to set aside agency regulations issued pursuant to this
2 subsection that are not in accord with the requirements of
3 subsections (b) through (f) of this section, and to require
4 the promulgation of regulations that are in accord with such
5 subsections.

6 "(h) The district courts of the United States have juris-
7 diction to enforce the requirements of subsections (b)
8 through (f) of this section. Such actions may be brought by
9 any person against an agency or its members prior to, or
10 within sixty days after, the meeting out of which the viola-
11 tion of this section arises, except that if public announce-
12 ment of such meeting is not initially provided by the
13 agency in accordance with the requirements of this section,
14 such action may be instituted pursuant to this section at any
15 time prior to sixty days after any public announcement of
16 such meeting. Such actions may be brought in the district
17 wherein the plaintiff resides, or has his principal place of
18 business, or where the agency in question has its headquar-
19 ters. In such actions a defendant shall serve his answer
20 within twenty days after the service of the complaint, but
21 such time may be extended by the court for up to twenty
22 additional days upon a showing of good cause therefor. The
23 burden is on the defendant to sustain his action. In deciding
24 such cases the court may examine in camera any portion of
25 a transcript or electronic recording of a meeting closed to the

1 public, and may take such additional evidence as it deems
2 necessary. The court, having due regard for orderly adminis-
3 tration and the public interest, as well as the interests of the
4 party, may grant such equitable relief as it deems appro-
5 priate, including granting an injunction against future viola-
6 tions of this section, or ordering the agency to make available
7 to the public such portion of the transcript or electronic
8 recording of a meeting as is not authorized to be withheld
9 under subsection (c) of this section. Except to the extent
10 provided in subsection (i) of this section, nothing in this sec-
11 tion confers jurisdiction on any district court acting solely
12 under this subsection to set aside, enjoin or invalidate any
13 agency action taken or discussed at an agency meeting out
14 of which the violation of this section arose.

15 "(i) Any Federal court otherwise authorized by law to
16 review agency action may, at the application of any person
17 properly participating in the judicial review proceeding, in-
18 quire into violations by the agency of the requirements of this
19 section and afford any such relief as it deems appropriate.

20 "(j) The court may assess against any party reasonable
21 attorney fees and other litigation costs reasonably incurred by
22 any other party who substantially prevails in any action
23 brought in accordance with the provisions of subsection (g),
24 (h), or (i) of this section, except that costs may be assessed
25 against an individual member of an agency only in the case

1 where the court finds such agency member has intentionally
2 and repeatedly violated this section and against the plaintiff
3 only where the court finds that the suit was initiated by the
4 plaintiff primarily for frivolous or dilatory purposes. In the
5 case of assessment of costs against an agency, the costs may
6 be assessed by the court against the United States.

7 "(k) Each agency subject to the requirements of this
8 section shall annually report to Congress regarding its com-
9 pliance with such requirements, including a tabulation of
10 the total number of agency meetings open to the public,
11 the total number of meetings closed to the public, the rea-
12 sons for closing such meetings, and a description of any
13 litigation brought against the agency under this section,
14 including any costs assessed against the agency in such
15 litigation (whether or not paid by the agency).

16 "(l) Except as specifically provided in this section,
17 nothing herein expands or limits the present rights of any
18 person under section 552 of this title, except that the pro-
19 visions of this Act shall govern in the case of any request
20 made pursuant to such section to copy or inspect the tran-
21 scripts or electronic recordings described in subsection (f)
22 of this section. The requirements of chapter 33 of title 44,
23 United States Code, shall not apply to the transcripts and
24 electronic recordings described in subsection (f) of this
25 section.

1 "(m) This section does not constitute authority to with-
2 hold any information from Congress, and does not authorize
3 the closing of any agency meeting or portion thereof other-
4 wise required by law to be open.

5 "(n) Nothing in this section authorizes any agency
6 to withhold from any individual any record, including tran-
7 scripts or electronic recordings required by this Act, which
8 is otherwise accessible to such individual under section 552a
9 of this title.

10 "(o) In the event that any meeting is subject to the pro-
11 visions of the Federal Advisory Committee Act as well as
12 the provisions of this section, the provisions of this section
13 shall govern.".

14 (b) The chapter analysis of chapter 5 of title 5,
15 United States Code, is amended by inserting:

"552b. Open meetings."

16 immediately below:

"552a. Records about individuals.".

17 EX PARTE COMMUNICATIONS

18 SEC. 4. (a) Section 557 of title 5, United States Code,
19 is amended by adding at the end thereof the following new
20 subsection:

21 "(d) (1) In any agency proceeding which is subject to
22 subsection (a) of this section, except to the extent required
23 for the disposition of ex parte matters as authorized by law—

1 "(A) no interested person outside the agency shall
2 make or cause to be made to any member of the body
3 comprising the agency, administrative law judge, or
4 other employee who is or may reasonably be expected
5 to be involved in the decisional process of the proceed-
6 ing, an ex parte communication relative to the merits
7 of the proceeding;
8 "(B) no member of the body comprising the agen-
9 cy, administrative law judge, or other employee who
10 is or may reasonably be expected to be involved in
11 the decisional process of the proceeding, shall make or
12 cause to be made to any interested person outside the
13 agency an ex parte communication relative to the merits
14 of the proceeding;
15 "(C) a member of the body comprising the agency,
16 administrative law judge, or other employee who is or
17 may reasonably be expected to be involved in the de-
18 cisional process of such proceeding who receives, or
19 who makes or causes to be made, a communication pro-
20 hibited by this subsection shall place on the public record
21 of the proceeding:
22 "(i) all such written communications;
23 "(ii) memoranda stating the substance of all
24 such oral communications; and
25 "(iii) all written responses, and memoranda

1 stating the substance of all oral responses, to the
2 materials described in clauses (i) and (ii) of this
3 subparagraph;
4 "(D) in the event of a communication prohibited
5 by this subsection and made or caused to be made by a
6 party, the agency, administrative law judge, or other
7 employee presiding at the hearing may, to the extent
8 consistent with the interests of justice and the policy of
9 the underlying statutes, require the person or party to
10 show cause why his claim or interest in the proceeding
11 should not be dismissed, denied, disregarded, or other-
12 wise adversely affected on account of such violation;
13 and
14 "(E) the prohibitions of this subsection shall apply
15 beginning at such time as the agency may designate, but
16 in no case shall they begin to apply later than the time
17 at which a proceeding is noticed for hearing unless the
18 person responsible for the communication has knowledge
19 that it will be noticed, in which case the prohibitions
20 shall apply beginning at the time of his acquisition of
21 such knowledge.
22 "(2) This section does not constitute authority to with-
23 hold information from Congress.".
24 (b) Section 551 of title 5, United States Code, is
25 amended—

1 (1) by striking out "and" at the end of paragraph
2 (12);
3 (2) by striking out the "act." at the end of para-
4 graph (13) and inserting in lieu thereof "act; and";
5 and
6 (3) by adding at the end thereof the following new
7 paragraph:
8 "(14) 'ex parte communication' means an oral or
9 written communication not on the public record with
10 respect to which reasonable prior notice to all parties
11 is not given.".
12 (c) Section 556(d) of title 5, United States Code, is
13 amended by inserting between the third and fourth sentences
14 thereof the following new sentence: "The agency may, to
15 the extent consistent with the interests of justice and the
16 policy of the underlying statutes administered by the agency,
17 consider a violation of section 557(d) of this title sufficient
18 grounds for a decision adverse to a person or party who has
19 committed such violation or caused such violation to occur.".
20 CONFORMING AMENDMENTS
21 SEC. 5. (a) Section 410(b)(1) of title 39, United
22 States Code, is amended by inserting after "Section 552
23 (public information)," the words "section 552a (records
24 about individuals), section 552b (open meetings),".

1 (b) Section 552 (b) (3) of title 5, United States Code,
2 is amended to read as follows:
3 "(3) required to be withheld from the public by
4 any statute establishing particular criteria or referring
5 to particular types of information;".

6 EFFECTIVE DATE

7 SEC. 6. (a) Except as provided in subsection (b) of
8 this section, the provisions of this Act shall take effect one
9 hundred and eighty days after the date of its enactment.
10 (b) Subsection (g) of section 552b of title 5, United
11 States Code, as added by section 3 (a) of this Act, shall take
12 effect upon enactment.

94TH CONGRESS
2D SESSION

H. R. 11656

[Report No. 94–880]

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 3, 1976

Ms. ABZUG (for herself, Mr. FASCELL, Mr. BROOKS, Mr. MOSS, Mr. MACDONALD of Massachusetts, Mr. MOORHEAD of Pennsylvania, Mr. ROSENTHAL, Mr. WRIGHT, Mr. FUQUA, Mr. CONYERS, Mr. JAMES V. STANTON, Ms. COLLINS of Illinois, Mr. JOHN L. BURTON, Mr. HARRINGTON, Mr. DRINAN, Mr. MEZVINSKY, Ms. JORDAN, Mr. EVANS of Indiana, Mr. MOFFETT, Mr. MAGUIRE, Mr. ASPIN, Mr. GUDE, Mr. MCCLOSKEY, Mr. STEELMAN, and Mr. PRITCHARD) introduced the following bill; which was referred to the Committee on Government Operations

MARCH 8, 1976

Reported with amendments, referred to the Committee on the Judiciary for a period ending not later than April 8, 1976, for consideration of such provisions of the bill as fall within the jurisdiction of that committee under rule X, clause (1) (m), and ordered to be printed

[Insert the part printed in italic]

A BILL

To provide that meetings of Government agencies shall be open to the public, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Government in the Sunshine Act".

DECLARATION OF POLICY

SEC. 2. It is hereby declared to be the policy of the United States that the public is entitled to the fullest prac-

1 ticable information regarding the decisionmaking processes
2 of the Federal Government. It is the purpose of this Act
3 to provide the public with such information while protecting
4 the rights of individuals and the ability of the Government
5 to carry out its responsibilities.

6 OPEN MEETINGS

7 SEC. 3. (a) Title 5, United States Code, is amended
8 by adding after section 552a the following new section:

9 **"§ 552b. Open meetings**

10 "(a) For purposes of this section—

11 "(1) the term 'agency' means the Federal Election
12 Commission and any agency, as defined in section 552
13 (e) of this title, headed by a collegial body composed of
14 two or more individual members, a majority of whom
15 are appointed to such position by the President with
16 the advice and consent of the Senate, and includes any
17 subdivision thereof authorized to act on behalf of the
18 agency;

19 "(2) the term 'meeting' means the deliberations of
20 at least the number of individual agency members re-
21 quired to take action on behalf of the agency where such
22 deliberations concern the joint conduct or disposition of
23 agency business; and

24 "(3) the term 'member' means an individual who
25 belongs to a collegial body heading an agency.

1 "(b) Except as provided in subsection (c), every por-
2 tion of every meeting of an agency shall be open to public
3 observation.

4 "(c) Except in a case where the agency finds that the
5 public interest requires otherwise, subsection (b) shall
6 not apply to any portion of an agency meeting and the
7 requirements of subsections (d) and (e) shall not apply to
8 any information pertaining to such meeting otherwise re-
9 quired by this section to be disclosed to the public, where the
10 agency properly determines that such portion or portions of
11 its meeting or the disclosure of such information is likely to—

12 "(1) disclose matters (A) specifically authorized
13 under criteria established by an Executive order to be
14 kept secret in the interests of national defense or foreign
15 policy and (B) in fact properly classified pursuant to
16 such Executive order;

17 "(2) relate solely to the internal personnel rules
18 and practices of an agency;

19 "(3) disclose information required to be withheld
20 from the public by any statute establishing particular
21 criteria or referring to particular types of information;

22 "(4) disclose trade secrets and commercial or finan-
23 cial information obtained from a person and privileged or
24 confidential;

1 "(5) involve accusing any person of a crime, or
2 formally censuring any person;
3 "(6) disclose information of a personal nature
4 where disclosure would constitute a clearly unwarranted
5 invasion of personal privacy;
6 "(7) disclose investigatory records compiled for
7 law enforcement purposes, but only to the extent that
8 the production of such records would (A) interfere with
9 enforcement proceedings, (B) deprive a person of a
10 right to a fair trial or an impartial adjudication, (C)
11 constitute an unwarranted invasion of personal privacy,
12 (D) disclose the identity of a confidential source and,
13 in the case of a record compiled by a criminal law en-
14 forcement authority in the course of a criminal investi-
15 gation, or by an agency conducting a lawful national
16 security intelligence investigation, confidential informa-
17 tion furnished only by the confidential source, (E) dis-
18 close investigative techniques and procedures, or (F)
19 endanger the life or physical safety of law enforcement
20 personnel;
21 "(8) disclose information contained in or related to
22 examination, operating, or condition reports prepared
23 by, on behalf of, or for the use of an agency responsible
24 for the regulation or supervision of financial institutions;

1 "(9) disclose information the premature disclosure
2 of which would—
3 "(A) in the case of an agency which regulates
4 currencies, securities, commodities, or financial in-
5 stitutions, be likely to (i) lead to significant financial
6 speculation, or (ii) significantly endanger the sta-
7 bility of any financial institution; or
8 "(B) in the case of any agency, be likely to
9 significantly frustrate implementation of a proposed
10 agency action, except that this subparagraph shall
11 not apply in any instance where the content or na-
12 ture of the proposed agency action already has been
13 disclosed to the public by the agency, or where the
14 agency is required by law to make such disclosure
15 prior to taking final agency action on such proposal;
16 or
17 "(10) specifically concern the agency's issuance
18 of a subpena, or the agency's participation in a civil
19 action, an action in a foreign court or international tri-
20 bunal, or an arbitration, or the initiation, conduct, or
21 disposition by the agency of a particular case of formal
22 agency adjudication pursuant to the procedures in section
23 554 of this title or otherwise involving a determination
24 on the record after opportunity for a hearing.

1 "(d) (1) Action under subsection (c) to close a por-
2 tion or portions of an agency meeting shall be taken only
3 when a majority of the entire membership of the agency
4 votes to take such action. A separate vote of the agency
5 members shall be taken with respect to each agency meeting
6 a portion or portions of which are proposed to be closed to
7 the public pursuant to subsection (c), or with respect to any
8 information which is proposed to be withheld under sub-
9 section (c). A single vote may be taken with respect to a
10 series of portions of meetings which are proposed to be
11 closed to the public, or with respect to any information con-
12 cerning such series, so long as each portion of a meeting
13 in such series involves the same particular matters, and is
14 scheduled to be held no more than thirty days after the
15 initial portion of a meeting in such series. The vote of each
16 agency member participating in such vote shall be recorded
17 and no proxies shall be allowed.

18 "(2) Whenever any person whose interests may be
19 directly affected by a portion of a meeting requests that the
20 agency close such portion to the public for any of the rea-
21 sons referred to in paragraph (5), (6), or (7) of subsec-
22 tion (c), the agency, upon request of any one of its members,
23 shall vote by recorded vote whether to close such meeting.

24 "(3) Within one day of any vote taken pursuant to
25 paragraph (1) or (2), the agency shall make publicly

1 available a written copy of such vote reflecting the vote of
2 each member on the question. If a portion of a meeting is
3 *to be* closed to the public, the agency shall, within one day
4 of the vote taken pursuant to paragraph (1) or (2) of this
5 subsection, make publicly available a full written explana-
6 tion of its action closing the portion together with a list of
7 all persons expected to attend the meeting and their
8 affiliation.

9 "(4) Any agency, a majority of the portions of whose
10 meetings may properly be closed to the public pursuant to
11 paragraph (4), (8), (9) (A), or (10) of subsection (c),
12 or any combination thereof, may provide by regulation for
13 the closing of such portions in the event that a majority of
14 the members of the agency votes by recorded vote at the
15 beginning of such meeting, or portion thereof, to close the
16 exempt portion or portions of the meeting, and a copy of
17 such vote, reflecting the vote of each member on the ques-
18 tion, is made available to the public. The provisions of para-
19 graphs (1), (2), and (3) of this subsection and subsection
20 (e) shall not apply to any portion of a meeting to which
21 such regulations apply: *Provided,* That the agency shall,
22 except to the extent that such information is exempt from
23 disclosure under the provisions of subsection (c), provide
24 the public with public announcement of the date, place, and
25 subject matter of the meeting and each portion thereof at

80-459 O - 77 - 32

1 the earliest practicable time and in no case later than the
2 commencement of the meeting or portion in question.
3 "(e) In the case of each meeting, the agency shall make
4 public announcement, at least one week before the meeting,
5 of the date, place, and subject matter of the meeting, whether
6 it is to be open or closed to the public, and the name and
7 phone number of the official designated by the agency to
8 respond to requests for information about the meeting. Such
9 announcement shall be made unless a majority of the mem-
10 bers of the agency determines by a recorded vote that agency
11 business requires that such meeting be called at an earlier
12 date, in which case the agency shall make public announce-
13 ment of the date, place, and subject matter of such meeting,
14 and whether open or closed to the public, at the earliest
15 practicable time and in no case later than the commence-
16 ment of the meeting or portion in question. The time, place,
17 or subject matter of a meeting, or the determination of the
18 agency to open or close a meeting, or portion of a meeting,
19 to the public, may be changed following the public announce-
20 ment required by this paragraph only if (1) a majority of
21 the entire membership of the agency determines by a re-
22 corded vote that agency business so requires and that no
23 earlier announcement of the change was possible, and (2)
24 the agency publicly announces such change and the vote
25 of each member upon such change at the earliest practicable

1 time and in no case later than the commencement of the
2 meeting or portion in question.
3 "(f) (1) A complete transcript or electronic recording
4 adequate to record fully the proceedings shall be made of each
5 meeting, or portion of a meeting, closed to the public, ex-
6 cept for a meeting, or portion of a meeting, closed to the
7 public pursuant to paragraph (10) of subsection (c). The
8 agency shall make promptly available to the public, in a
9 location easily accessible to the public, the complete transcript
10 or electronic recording of the discussion at such meeting of
11 any item on the agenda, or of the testimony of any witness
12 received at such meeting, except for such portion or portions
13 of such discussion or testimony as the agency, by recorded
14 vote taken subsequent to the meeting and promptly made
15 available to the public, determines to contain information
16 specified in paragraphs (1) through (10) of subsection (c).
17 In place of each portion deleted from such a transcript or
18 transcription the agency shall supply a written explanation
19 of the reason for the deletion, and the portion of subsection
20 (c) and any other statute said to permit the deletion. Copies
21 of such transcript, or a transcription of such electronic re-
22 cording disclosing the identity of each speaker, shall be fur-
23 nished to any person at no greater than the actual cost of
24 duplication or transcription or, if in the public interest, at
25 no cost. The agency shall maintain a complete verbatim

1 copy of the transcript, or a complete electronic recording of
2 each meeting, or portion of a meeting, closed to the public,
3 for a period of at least two years after such meeting,
4 or until one year after the conclusion of any agency pro-
5 ceeding with respect to which the meeting, or a portion
6 thereof, was held, whichever occurs later.

7 "(2) Written minutes shall be made of any agency meet-
8 ing, or portion thereof, which is open to the public. The
9 agency shall make such minutes promptly available to the
10 public in a location easily accessible to the public, and shall
11 maintain such minutes for a period of at least two years after
12 such meeting. Copies of such minutes shall be furnished to
13 any person at no greater than the actual cost of duplication
14 thereof or, if in the public interest, at no cost.

15 "(g) Each agency subject to the requirements of this
16 section shall, within 180 days after the date of enactment
17 of this section, following consultation with the Office of the
18 Chairman of the Administrative Conference of the United
19 States and published notice in the Federal Register of at
20 least thirty days and opportunity for written comment by
21 any persons, promulgate regulations to implement the re-
22 quirements of subsections (b) through (f) of this section.
23 Any person may bring a proceeding in the United States
24 District Court for the District of Columbia to require an
25 agency to promulgate such regulations if such agency has

1 not promulgated such regulations within the time period
2 specified herein. Subject to any limitations of time therefor
3 provided by law, any person may bring a proceeding in
4 the United States Court of Appeals for the District of Colum-
5 bia to set aside agency regulations issued pursuant to this
6 subsection that are not in accord with the requirements of
7 subsections (b) through (f) of this section, and to require
8 the promulgation of regulations that are in accord with such
9 subsections.

10 "(h) The district courts of the United States have juris-
11 diction to enforce the requirements of subsections (b)
12 through (f) of this section. Such actions may be brought by
13 any person against an agency or its members prior to, or
14 within sixty days after, the meeting out of which the viola-
15 tion of this section arises, except that if public announce-
16 ment of such meeting is not initially provided by the
17 agency in accordance with the requirements of this section,
18 such action may be instituted pursuant to this section at any
19 time prior to sixty days after any public announcement of
20 such meeting. Such actions may be brought in the district
21 wherein the plaintiff resides, or has his principal place of
22 business, or where the agency in question has its headquar-
23 ters. In such actions a defendant shall serve his answer
24 within twenty days after the service of the complaint, but
25 such time may be extended by the court for up to twenty

1 additional days upon a showing of good cause therefor. The
2 burden is on the defendant to sustain his action. In deciding
3 such cases the court may examine in camera any portion of
4 a transcript or electronic recording of a meeting closed to the
5 public, and may take such additional evidence as it deems
6 necessary. The court, having due regard for orderly adminis-
7 tration and the public interest, as well as the interests of the
8 party, may grant such equitable relief as it deems appro-
9 priate, including granting an injunction against future viola-
10 tions of this section, or ordering the agency to make available
11 to the public such portion of the transcript or electronic
12 recording of a meeting as is not authorized to be withheld
13 under subsection (c) of this section. Except to the extent
14 provided in subsection (i) of this section, nothing in this sec-
15 tion confers jurisdiction on any district court acting solely
16 under this subsection to set aside, enjoin or invalidate any
17 agency action taken or discussed at an agency meeting out
18 of which the violation of this section arose.

19 "(i) Any Federal court otherwise authorized by law to
20 review agency action may, at the application of any person
21 properly participating in the judicial review proceeding, in-
22 quire into violations by the agency of the requirements of this
23 section and afford any such relief as it deems appropriate.

24 "(j) The court may assess against any party reasonable
25 attorney fees and other litigation costs reasonably incurred by

1 any other party who substantially prevails in any action
2 brought in accordance with the provisions of subsection (g),
3 (h), or (i) of this section, except that costs may be assessed
4 against an individual member of an agency only in the case
5 where the court finds such agency member has intentionally
6 and repeatedly violated this section and against the plaintiff
7 only where the court finds that the suit was initiated by the
8 plaintiff primarily for frivolous or dilatory purposes. In the
9 case of assessment of costs against an agency, the costs may
10 be assessed by the court against the United States.

11 "(k) Each agency subject to the requirements of this
12 section shall annually report to Congress regarding its com-
13 pliance with such requirements, including a tabulation of the
14 total number of agency meetings open to the public, the
15 total number of meetings closed to the public, the reasons
16 for closing such meetings, and a description of any litigation
17 brought against the agency under this section, including any
18 costs assessed against the agency in such litigation (whether
19 or not paid by the agency).

20 "(l) Except as specifically provided in this section,
21 nothing herein expands or limits the present rights of any
22 person under section 552 of this title, except that the pro-
23 visions of this Act shall govern in the case of any request
24 made pursuant to such section to copy or inspect the tran-
25 scripts or electronic recordings described in subsection (f)

1 of this section. The requirements of chapter 33 of title 44,
2 United States Code, shall not apply to the transcripts and
3 electronic recordings described in subsection (f) of this
4 section.

5 "(m) This section does not constitute authority to with-
6 hold any information from Congress, and does not authorize
7 the closing of any agency meeting or portion thereof other-
8 wise required by law to be open.

9 "(n) Nothing in this section authorizes any agency
10 to withhold from any individual any record, including tran-
11 scripts or electronic recordings required by this Act, which
12 is otherwise accessible to such individual under section 552a
13 of this title.

14 "(o) In the event that any meeting is subject to the pro-
15 visions of the Federal Advisory Committee Act as well as
16 the provisions of this section, the provisions of this section
17 shall govern.".

18 (b) The chapter analysis of chapter 5 of title 5,
19 United States Code, is amended by inserting:

"552b. Open meetings."

20 immediately below:

"552a. Records about individuals.".

21 EX PARTE COMMUNICATIONS

22 SEC. 4. (a) Section 557 of title 5, United States Code,

1 is amended by adding at the end thereof the following new
2 subsection:
3 "(d) (1) In any agency proceeding which is subject to
4 subsection (a) of this section, except to the extent required
5 for the disposition of ex parte matters as authorized by law—
6 "(A) no interested person outside the agency shall
7 make or cause to be made to any member of the body
8 comprising the agency, administrative law judge, or
9 other employee who is or may reasonably be expected
10 to be involved in the decisional process of the proceed-
11 ing, an ex parte communication relative to the merits
12 of the proceeding;
13 "(B) no member of the body comprising the agen-
14 cy, administrative law judge, or other employee who
15 is or may reasonably be expected to be involved in
16 the decisional process of the proceeding, shall make or
17 cause to be made to any interested person outside the
18 agency an ex parte communication relative to the merits
19 of the proceeding;
20 "(C) a member of the body comprising the agency,
21 administrative law judge, or other employee who is or
22 may reasonably be expected to be involved in the de-
23 cisional process of such proceeding who receives, or
24 who makes or causes to be made, a communication pro-

1 hibited by this subsection shall place on the public record
2 of the proceeding:
3 "(i) all such written communications;
4 "(ii) memoranda stating the substance of all
5 such oral communications; and
6 "(iii) all written responses, and memoranda
7 stating the substance of all oral responses, to the
8 materials described in clauses (i) and (ii) of this
9 subparagraph;
10 "(D) in the event of a communication prohibited
11 by this subsection and made or caused to be made by a
12 party *or interested person*, the agency, administrative
13 law judge, or other employee presiding at the hearing
14 may, to the extent consistent with the interests of justice
15 and the policy of the underlying statutes, require the
16 person or party to show cause why his claim or interest
17 in the proceeding should not be dismissed, denied, dis-
18 regarded, or otherwise adversely affected on account of
19 such violation; and
20 "(E) the prohibitions of this subsection shall apply
21 beginning at such time as the agency may designate,
22 but in no case shall they begin to apply later than the
23 time at which a proceeding is noticed for hearing unless
24 the person responsible for the communication has knowl-
25 edge that it will be noticed, in which case the prohibi-

1 tions shall apply beginning at the time of his acquisition
2 of such knowledge.
3 "(2) This section does not constitute authority to with-
4 hold information from Congress.".
5 (b) Section 551 of title 5, United States Code, is
6 amended—
7 (1) by striking out "and" at the end of paragraph
8 (12);
9 (2) by striking out the "act." at the end of para-
10 graph (13) and inserting in lieu thereof "act; and";
11 and
12 (3) by adding at the end thereof the following new
13 paragraph:
14 "(14) 'ex parte communication' means an oral or
15 written communication not on the public record with
16 respect to which reasonable prior notice to all parties
17 is not given.".
18 (c) Section 556(d) of title 5, United States Code, is
19 amended by inserting between the third and fourth sentences
20 thereof the following new sentence: "The agency may, to
21 the extent consistent with the interests of justice and the
22 policy of the underlying statutes administered by the agency,
23 consider a violation of section 557(d) of this title sufficient
24 grounds for a decision adverse to a person or party who has
25 committed such violation or caused such violation to occur.".

1 CONFORMING AMENDMENTS

2 SEC. 5. (a) Section 410(b)(1) of title 39, United
3 States Code, is amended by inserting after "Section 552
4 (public information)," the words "section 552a (records
5 about individuals), section 552b (open meetings),".

6 (b) Section 552(b)(3) of title 5, United States Code,
7 is amended to read as follows:

8 "(3) required to be withheld from the public by
9 any statute establishing particular criteria or referring
10 to particular types of information;".

11 EFFECTIVE DATE

12 SEC. 6. (a) Except as provided in subsection (b) of
13 this section, the provisions of this Act shall take effect one
14 hundred and eighty days after the date of its enactment.

15 (b) Subsection (g) of section 552b of title 5, United
16 States Code, as added by section 3(a) of this Act, shall take
17 effect upon enactment.

Union Calendar No. 496

94TH CONGRESS
2D SESSION

H. R. 11656

[Report No. 94–880, Part I, Part II]

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 3, 1976

Ms. ABZUG (for herself, Mr. FASCELL, Mr. BROOKS, Mr. MOSS, Mr. MACDONALD of Massachusetts, Mr. MOORHEAD of Pennsylvania, Mr. ROSENTHAL, Mr. WRIGHT, Mr. FUQUA, Mr. CONYERS, Mr. JAMES V. STANTON, Ms. COLLINS of Illinois, Mr. JOHN L. BURTON, Mr. HARRINGTON, Mr. DRINAN, Mr. MEZVINSKY, Ms. JORDAN, Mr. EVANS of Indiana, Mr. MOFFETT, Mr. MAGUIRE, Mr. ASPIN, Mr. GUDE, Mr. MCCLOSKEY, Mr. STEELMAN, and Mr. PRITCHARD) introduced the following bill; which was referred to the Committee on Government Operations

MARCH 8, 1976

Reported with amendments, referred to the Committee on the Judiciary for a period ending not later than April 8, 1976, for consideration of such provisions of the bill as fall within the jurisdiction of that committee under rule X, clause (1) (m), and ordered to be printed

[Insert the part printed in italic]

APRIL 8, 1976

Reported with amendments, committed to the Committee of the Whole House on the State of the Union, and ordered to be printed

[Omit the part struck through and insert the part printed in boldface]

A BILL

To provide that meetings of Government agencies shall be open to the public, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 That this Act may be cited as the "Government in the
4 Sunshine Act".

DECLARATION OF POLICY

SEC. 2. It is hereby declared to be the policy of the United States that the public is entitled to the fullest practicable information regarding the decisionmaking processes of the Federal Government. It is the purpose of this Act to provide the public with such information while protecting the rights of individuals and the ability of the Government to carry out its responsibilities.

OPEN MEETINGS

SEC. 3. (a) Title 5, United States Code, is amended by adding after section 552a the following new section:

"§ 552b. Open meetings

"(a) For purposes of this section—

"(1) the term 'agency' means the Federal Election Commission and any agency, as defined in section 552 (e) of this title, headed by a collegial body composed of two or more individual members, a majority of whom are appointed to such position by the President with the advice and consent of the Senate, and includes any subdivision thereof authorized to act on behalf of the agency;

~~"(2) the term 'meeting' means the deliberations of at least the number of individual agency members required to take action on behalf of the agency where such~~

~~deliberations concern the joint conduct or disposition of agency business; and~~

"(2) the term 'meeting' means an assembly or simultaneous communication concerning the joint conduct or disposition of agency business by two or more, but at least the number of individual agency members required to take action on behalf of the agency, but does not include meetings required or permitted by subsection (d); and

"(3) the term 'member' means an individual who belongs to a collegial body heading an agency.

"(b)(1) Members as described in subsection (a)(2) shall not jointly conduct or dispose of agency business without complying with subsections (b) through (g).

~~"(b)~~ **(2)** Except as provided in subsection (c), every portion of every meeting of an agency shall be open to public observation.

"(c) Except in a case where the agency finds that the public interest requires otherwise, subsection (b) shall not apply to any portion of an agency meeting and the requirements of subsections (d) and (e) shall not apply to any information pertaining to such meeting otherwise required by this section to be disclosed to the public, where the

1 agency properly determines that such portion or portions of
2 its meeting or the disclosure of such information is likely to—
3 "(1) disclose matters (A) specifically authorized
4 under criteria established by an Executive order to be
5 kept secret in the interests of national defense or foreign
6 policy and (B) in fact properly classified pursuant to
7 such Executive order;
8 "(2) relate solely to the internal personnel rules
9 and practices of an agency;
10 "(3) disclose information required **or permitted** to
11 be withheld from the public by any statute establishing
12 particular criteria or referring to particular types of in-
13 formation;
14 "(4) disclose trade secrets and commercial or finan-
15 cial information obtained from a person and privileged or
16 confidential;
17 "(5) involve accusing any person of a crime, or
18 formally censuring any person;
19 "(6) disclose information of a personal nature
20 where disclosure would constitute a clearly unwarranted
21 invasion of personal privacy;
22 "(7) disclose investigatory records compiled for
23 law enforcement purposes, **or information which if**
24 **written would be contained in such records,** but only
25 to the extent that the production of such records **or**

1 **information** would (A) interfere with enforcement
2 proceedings, (B) deprive a person of a right to a fair
3 trial or an impartial adjudication, (C) constitute an un-
4 warranted invasion of personal privacy, (D) disclose
5 the identity of a confidential source and, in the case of
6 a record compiled by a criminal law enforcement author-
7 ity in the course of a criminal investigation, or by an
8 agency conducting a lawful national security intelligence
9 investigation, confidential information furnished only by
10 the confidential source, (E) disclose investigative tech-
11 niques and procedures, or (F) endanger the life or
12 physical safety of law enforcement personnel;
13 "(8) disclose information contained in or related to
14 examination, operating, or condition reports prepared
15 by, on behalf of, or for the use of an agency responsible
16 for the regulation or supervision of financial institutions;
17 "(9) disclose information the premature disclosure
18 of which would—
19 "(A) in the case of an agency which regulates
20 currencies, securities, commodities, or financial in-
21 stitutions, be likely to (i) lead to significant financial
22 speculation, or (ii) significantly endanger the sta-
23 bility of any financial institution; or
24 "(B) in the case of any agency, be likely to
25 significantly frustrate implementation of a proposed

80-459 O - 77 - 33

agency action, except that this subparagraph shall not apply in any instance ~~where~~ **after** the content or nature of the proposed agency action ~~already~~ has been disclosed to the public by the agency, ~~or where~~ **unless** the agency is required by law to make such disclosure prior to taking final agency action on such ~~proposal;~~ **proposal, or after the agency publishes or serves a substantive rule pursuant to section 553(d) of this title;** or

"(10) specifically concern the agency's issuance of a subpena, or the agency's participation in a civil action **or proceeding**, an action in a foreign court or international tribunal, or an arbitration, or the initiation, conduct, or disposition by the agency of a particular case of formal agency adjudication pursuant to the procedures in section 554 of this title or otherwise involving a determination on the record after opportunity for a hearing.

"(d) (1) Action under subsection (c) to close a portion or portions of an agency meeting shall be taken only when a majority of the entire membership of the agency votes to take such action. A separate vote of the agency members shall be taken with respect to each agency meeting a portion or portions of which are proposed to be closed to the public pursuant to subsection (c)~~, or with respect to any~~

1 ~~information which is proposed to be withheld under sub-~~
2 ~~section (c)~~. A single vote may be taken with respect to a
3 series of portions of meetings which are proposed to be
4 closed to the public, or with respect to any information con-
5 cerning such series, so long as each portion of a meeting
6 in such series involves the same particular matters, and is
7 scheduled to be held no more than thirty days after the
8 initial portion of a meeting in such series. The vote of each
9 agency member participating in such vote shall be recorded
10 and no proxies shall be allowed.

11 "(2) Whenever any person whose interests may be
12 directly affected by a portion of a meeting requests that the
13 agency close such portion to the public for any of the rea-
14 sons referred to in paragraph (5), (6), or (7) of subsec-
15 tion (c), the agency, upon request of any one of its members,
16 shall vote by recorded vote whether to close such meeting.

17 "(3) Within one day of any vote taken pursuant to
18 paragraph (1) or (2), the agency shall make publicly
19 available a written copy of such vote reflecting the vote of
20 each member on the question. If a portion of a meeting is
21 *to be* closed to the public, the agency shall, within one day
22 of the vote taken pursuant to paragraph (1) or (2) of this
23 subsection, make publicly available a full written explana-
24 tion of its action closing the portion together with a list of

all persons expected to attend the meeting and their affiliation.

"(4) Any agency, a majority ~~of the portions~~ of whose meetings may properly be closed to the public pursuant to paragraph (4), (8), (9) (A), or (10) of subsection (c), or any combination thereof, may provide by regulation for the closing of such ~~portions~~ **meetings or portions thereof** in the event that a majority of the members of the agency votes by recorded vote at the beginning of such meeting, or portion thereof, to close the exempt portion or portions of the meeting, and a copy of such vote, reflecting the vote of each member on the question, is made available to the public. The provisions of paragraphs (1), (2), and (3) of this subsection and subsection (e) shall not apply to any portion of a meeting to which such regulations apply: *Provided,* That the agency shall, except to the extent that such information is exempt from disclosure under the provisions of subsection (c), provide the public with public announcement of the date, place, and subject matter of the meeting and each portion thereof at the earliest practicable time and in no case later than the commencement of the meeting or portion in question.

"(e) In the case of each meeting, the agency shall make public announcement, at least one week before the meeting, of the date, place, and subject matter of the meeting, whether

1 it is to be open or closed to the public, and the name and
2 phone number of the official designated by the agency to
3 respond to requests for information about the meeting. Such
4 announcement shall be made unless a majority of the mem-
5 bers of the agency determines by a recorded vote that agency
6 business requires that such meeting be called at an earlier
7 date, in which case the agency shall make public announce-
8 ment of the date, place, and subject matter of such meeting,
9 and whether open or closed to the public, at the earliest
10 practicable time and in no case later than the commence-
11 ment of the meeting or portion in question. The time, place,
12 or subject matter of a meeting, or the determination of the
13 agency to open or close a meeting, or portion of a meeting,
14 to the public, may be changed following the public announce-
15 ment required by this paragraph only if (1) a majority of
16 the entire membership of the agency determines by a re-
17 corded vote that agency business so requires and that no
18 earlier announcement of the change was possible, and (2)
19 the agency publicly announces such change and the vote
20 of each member upon such change at the earliest practicable
21 time and in no case later than the commencement of the
22 meeting or portion in question.
23 "(f) (1) A complete transcript or electronic recording
24 adequate to record fully the proceedings shall be made of each

1 meeting, or portion of a meeting, closed to the public, ex-
2 cept for a meeting, or portion of a meeting, closed to the
3 public pursuant to paragraph (10) of subsection (c). The
4 agency shall make promptly available to the public, in a
5 location easily accessible to the public, the complete transcript
6 or electronic recording of the discussion at such meeting of
7 any item on the agenda, or of the testimony of any witness
8 received at such meeting, except for such portion or portions
9 of such discussion or testimony as the agency,– ~~by recorded~~
10 ~~vote taken subsequent to the meeting and promptly made~~
11 ~~available to the public,~~ determines to contain information
12 specified in paragraphs (1) through (10) of subsection (c).
13 ~~In place of each portion deleted from such a transcript or~~
14 ~~transcription the agency shall supply a written explanation~~
15 ~~of the reason for the deletion, and the portion of subsection~~
16 ~~(c) and any other statute said to permit the deletion.~~ Copies
17 of such transcript, or a transcription of such electronic re-
18 cording disclosing the identity of each speaker, shall be fur-
19 nished to any person at no greater than the actual cost of
20 duplication or transcription or, if in the public interest, at
21 no cost. The agency shall maintain a complete verbatim
22 copy of the transcript, or a complete electronic recording of
23 each meeting, or portion of a meeting, closed to the public,
24 for a period of at least two years after such meeting,
25 or until one year after the conclusion of any agency pro-

1 ceeding with respect to which the meeting, or a portion
2 thereof, was held, whichever occurs later.
3 "(2) Written minutes shall be made of any agency meet-
4 ing, or portion thereof, which is open to the public. The
5 agency shall make such minutes promptly available to the
6 public in a location easily accessible to the public, and shall
7 maintain such minutes for a period of at least two years after
8 such meeting. Copies of such minutes shall be furnished to
9 any person at no greater than the actual cost of duplication
10 thereof or, if in the public interest, at no cost.
11 "(g) Each agency subject to the requirements of this
12 section shall, within 180 days after the date of enactment
13 of this section, following consultation with the Office of the
14 Chairman of the Administrative Conference of the United
15 States and published notice in the Federal Register of at
16 least thirty days and opportunity for written comment by
17 any persons, promulgate regulations to implement the re-
18 quirements of subsections (b) through (f) of this section.
19 Any person may bring a proceeding in the United States
20 District Court for the District of Columbia to require an
21 agency to promulgate such regulations if such agency has
22 not promulgated such regulations within the time period
23 specified herein. Subject to any limitations of time therefor
24 provided by law, any person may bring a proceeding in
25 the United States Court of Appeals for the District of Colum-

1 bia to set aside agency regulations issued pursuant to this
2 subsection that are not in accord with the requirements of
3 subsections (b) through (f) of this section, and to require
4 the promulgation of regulations that are in accord with such
5 subsections.

6 "(h) The district courts of the United States have juris-
7 diction to enforce the requirements of subsections (b)
8 through (f) of this section. Such actions may be brought by
9 any person against an agency ~~or its members~~ prior to, or
10 within sixty days after, the meeting out of which the viola-
11 tion of this section arises, except that if public announce-
12 ment of such meeting is not initially provided by the
13 agency in accordance with the requirements of this section,
14 such action may be instituted pursuant to this section at any
15 time prior to sixty days after any public announcement of
16 such meeting. Such actions may be brought in the district
17 ~~wherein the plaintiff resides, or has his principal place of~~
18 ~~business,~~ **court of the United States for the district in**
19 **which the agency meeting is held, or in the District Court**
20 **for the District of Columbia**, or where the agency in
21 question has its headquarters. In such actions a defendant
22 shall serve his answer within twenty days after the service
23 of the complaint, but such time may be extended by the
24 court for up to twenty additional days upon a showing of
25 good cause therefor. The burden is on the defendant to

sustain his action. In deciding such cases the court may examine in camera any portion of a transcript or electronic recording of a meeting closed to the public, and may take such additional evidence as it deems necessary. The court, having due regard for orderly administration and the public interest, as well as the interests of the party, may grant such equitable relief as it deems appropriate, including granting an injunction against future violations of this section, or ordering the agency to make available to the public such portion of the transcript or electronic recording of a meeting as is not authorized to be withheld under subsection (c) of this section. ~~Except to the extent provided in subsection (i) of this section, nothing~~ **Nothing** in this section confers jurisdiction on any district court acting solely under this subsection to set aside, enjoin or invalidate any agency action taken or discussed at an agency meeting out of which the violation of this section arose.

"~~(i) Any Federal court otherwise authorized by law to review agency action may, at the application of any person properly participating in the judicial review proceeding, inquire into violations by the agency of the requirements of this section and afford any such relief as it deems appropriate.~~

"~~(j)~~ **(i)** The court may assess against any party reasonable attorney fees and other litigation costs reasonably

1 incurred by any other party who substantially prevails in
2 any action brought in accordance with the provisions of
3 subsection ~~(g), (h), or (i)~~ **(g) or (h)** of this section, except
4 that costs may be assessed ~~against an individual member of~~
5 ~~an agency only in the case where the court finds such agency~~
6 ~~member has intentionally and repeatedly violated this sec-~~
7 ~~tion and~~ against the plaintiff only where the court finds
8 that the suit was initiated by the plaintiff primarily for
9 frivolous or dilatory purposes. In the case of assessment of
10 costs against an agency, the costs may be assessed by the
11 court against the United States.

12 "~~(k)~~ **(j)** Each agency subject to the requirements of this
13 section shall annually report to Congress regarding its com-
14 pliance with such requirements, including a tabulation of the
15 total number of agency meetings open to the public, the
16 total number of meetings closed to the public, the reasons
17 for closing such meetings, and a description of any litigation
18 brought against the agency under this section, including any
19 costs assessed against the agency in such litigation (whether
20 or not paid by the agency).

21 "~~(l)~~ **(k)** Except as specifically provided in this section,
22 nothing herein expands or limits the present rights of any
23 person under section 552 of this title, except that the pro-
24 visions of this Act shall govern in the case of any request

1 made pursuant to such section to copy or inspect the tran-
2 scripts or electronic recordings described in subsection (f)
3 of this section. The requirements of chapter 33 of title 44,
4 United States Code, shall not apply to the transcripts and
5 electronic recordings described in subsection (f) of this
6 section.

7 "~~(m)~~ **(l)** This section does not constitute authority to
8 withhold any information from Congress, and does not au-
9 thorize the closing of any agency meeting or portion thereof
10 otherwise required by law to be open.

11 "~~(n)~~ **(m)** Nothing in this section authorizes any
12 agency to withhold from any individual any record, includ-
13 ing transcripts or electronic recordings required by this Act,
14 which is otherwise accessible to such individual under sec-
15 tion 552a of this title.

16 "~~(o)~~ **(n)** In the event that any meeting is subject to the
17 provisions of the Federal Advisory Committee Act as well
18 as the provisions of this section, the provisions of this sec-
19 tion shall govern.".

20 (b) The chapter analysis of chapter 5 of title 5, United
21 States Code, is amended by inserting:

"552b. Open meetings."

22 immediately below:

"552a. Records about individuals.".

1 EX PARTE COMMUNICATIONS

2 SEC. 4. (a) Section 557 of title 5, United States Code,
3 is amended by adding at the end thereof the following new
4 subsection:

5 "(d) (1) In any agency proceeding which is subject to
6 subsection (a) of this section, except to the extent required
7 for the disposition of ex parte matters as authorized by law—

8 "(A) no interested person outside the agency shall
9 make or cause to be made to any member of the body
10 comprising the agency, administrative law judge, or
11 other employee who is or may reasonably be expected
12 to be involved in the decisional process of the proceed-
13 ing, an ex parte communication relative to the merits
14 of the proceeding;

15 "(B) no member of the body comprising the agen-
16 cy, administrative law judge, or other employee who
17 is or may reasonably be expected to be involved in
18 the decisional process of the proceeding, shall make or
19 cause to be made to any interested person outside the
20 agency an ex parte communication relative to the merits
21 of the proceeding;

22 "(C) a member of the body comprising the agency,
23 administrative law judge, or other employee who is or
24 may reasonably be expected to be involved in the de-
25 cisional process of such proceeding who receives, or

1 who makes or causes to be made, a communication pro-
2 hibited by this subsection shall place on the public record
3 of the proceeding:
4 "(i) all such written communications;
5 "(ii) memoranda stating the substance of all
6 such oral communications; and
7 "(iii) all written responses, and memoranda
8 stating the substance of all oral responses, to the
9 materials described in clauses (i) and (ii) of this
10 subparagraph;
11 "(D) in the event of a communication prohibited
12 by this subsection and made or caused to be made by a
13 party *or interested person*, the agency, administrative
14 law judge, or other employee presiding at the hearing
15 may, to the extent consistent with the interests of justice
16 and the policy of the underlying statutes, require the
17 person or party to show cause why his claim or interest
18 in the proceeding should not be dismissed, denied, dis-
19 regarded, or otherwise adversely affected on account of
20 such violation; and
21 "(E) the prohibitions of this subsection shall apply
22 beginning at such time as the agency may designate,
23 but in no case shall they begin to apply later than the
24 time at which a proceeding is noticed for hearing unless
25 the person responsible for the communication has knowl-

1 edge that it will be noticed, in which case the prohibi-
2 tions shall apply beginning at the time of his acquisition
3 of such knowledge.
4 "(2) This section does not constitute authority to with-
5 hold information from Congress.".
6 (b) Section 551 of title 5, United States Code, is
7 amended—
8 (1) by striking out "and" at the end of paragraph
9 (12);
10 (2) by striking out the "act." at the end of para-
11 graph (13) and inserting in lieu thereof "act; and";
12 and
13 (3) by adding at the end thereof the following new
14 paragraph:
15 "(14) 'ex parte communication' means an oral or
16 written communication not on the public record with
17 respect to which reasonable prior notice to all parties
18 is not given.".
19 (c) Section 556(d) of title 5, United States Code, is
20 amended by inserting between the third and fourth sentences
21 thereof the following new sentence: "The agency may, to
22 the extent consistent with the interests of justice and the
23 policy of the underlying statutes administered by the agency,
24 consider a violation of section 557(d) of this title sufficient

1 grounds for a decision adverse to a person or party who has
2 committed such violation or caused such violation to occur.".

3 CONFORMING AMENDMENTS

4 SEC. 5. (a) Section 410(b)(1) of title 39, United
5 States Code, is amended by inserting after "Section 552
6 (public information)," the words "section 552a (records
7 about individuals), section 552b (open meetings),".

8 (b) Section 552(b)(3) of title 5, United States Code,
9 is amended to read as follows:

10 "(3) required **or permitted** to be withheld from
11 the public by any statute establishing particular criteria
12 or referring to particular types of information;".

13 EFFECTIVE DATE

14 SEC. 6. (a) Except as provided in subsection (b) of
15 this section, the provisions of this Act shall take effect one
16 hundred and eighty days after the date of its enactment.

17 (b) Subsection (g) of section 552b of title 5, United
18 States Code, as added by section 3(a) of this Act, shall take
19 effect upon enactment.

94TH CONGRESS } HOUSE OF REPRESENTATIVES { REPT. 94–880
2d Session } { Part I

GOVERNMENT IN THE SUNSHINE ACT

MARCH 8, 1976.—Ordered to be printed

Mr. BROOKS, from the Committee on Government Operations, submitted the following

REPORT

together with

ADDITIONAL VIEWS

[To accompany H.R. 11656]

The Committee on Government Operations, to whom was referred the bill (H.R. 11656) to provide that meetings of Government agencies shall be open to the public, and for other purposes, having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

AMENDMENTS

The two committee amendments, each of which is of a technical and conforming nature, are:

Page 7, line 3, before "closed" insert "to be".

Page 16, line 12, after "party" insert "or interested person".

EXPLANATION OF AMENDMENTS

The first amendment changes from the present to the future tense a reference to a meeting that has not yet been held.

The second amendment conforms one subparagraph of the ex parte communications provisions of the bill to the remainder of those provisions. The prohibition on such communications to an agency decisionmaking official applies to anyone who is an "interested person". Subparagraph (D) of the proposed section 557(d)(1) of title 5, United States Code, refers in its original form only to a "party", and the amendment adds "interested person" so as to make this subparagraph conform to the rest of section 4.

Purpose

The purpose of H.R. 11656 is to provide that meetings of multimember Federal agencies shall be open to the public, with the exception of discussions of several narrowly defined areas. The bill also prohibits ex parte communications to and from agency decisionmaking officials with respect to the merits of pending proceedings.

The basic premise of the Sunshine legislation is that, in the words of Federalist No. 49, "the people are the only legitimate fountain of power, and it is from them that the constitutional charter . . . is derived." Government is and should be the servant of the people, and it should be fully accountable to them for the actions which it supposedly takes on their behalf.

In a theoretical sense, the agencies in the executive branch are already accountable to the people through the President, who is indirectly elected, and the Congress, whose members are directly elected. This theoretical accountability, though, leaves agency commissioners far removed from the public view in their day-to-day activities.

Absent special circumstances, there is no reason why the public should not have the right to observe the agency decisionmaking process first-hand. In the words of FCC Commissioner Glen O. Robinson, who testified before the Government Information and Individual Rights Subcommittee on this legislation:

> Chief among the benefits [of the legislation] is increasing public understanding of administrative decisionmaking processes. * * * I do not know whether that understanding will lead to greater confidence in administrative decisionmaking. * * * Quite possibly, it could lead to less confidence. But either of these outcomes * * * can be beneficial: if, in the light of sunshine a Government agency shows itself to be deserving of trust, then by all means it should have it; conversely, if that same sunlight reveals and agency to be inept, inefficient, and not in pursuit of the public interest, then obviously that agency does not deserve, and should not have, public trust. (Hearings on H.R. 10315 and H.R. 9868, p. 98.)

The legislation requires that when an agency closes a meeting under one of the exemptions in the bill, it must make a recording or verbatim transcript of the closed portion and release to the public any part of the recording or transcript that does not contain exempt information. A second purpose of this requirement is to assure that a citizen has a meaningful remedy when a meeting has been illegally closed, namely, the release by the court of the transcript of the illegally closed portion.

The purpose of the provisions of the bill prohibiting ex parte communications is to insure that agency decisions required to be made on a public record are not influenced by private, off-the-record communications from those personally interested in the outcome.

80-459 O - 77 - 34

Summary of Major Provisions of the Legislation
Open Meetings

The open meeting provisions would apply to the approximately 50 Federal agencies that (1) are presently covered by the Freedom of Information Act and the Privacy Act, and (2) are headed by a body of two or more members, a majority of whom are chosen by the President with the advice and consent of the Senate. The measure is also expressly made applicable to the Federal Election Commission and the Post Service. Meetings covered under the bill include not only sessions at which formal action is taken, but also those at which a quorum of members deliberates regarding the conduct or disposition of agency business. A chance encounter or social gathering would not be a meeting within the meaning of the bill so long as no agency business is conducted or disposed of.

The bill requires that every part of every meeting be open to the public unless it falls within one of the bill's 10 specific exemptions. In case of doubt as to whether a portion of a meeting is exempt, the presumption is to be in favor of openness. Even if a matter falls within an exemption, the discussion must be open where the public interest so requires.

No meeting or portion thereof may be closed unless a majority of the entire membership votes to take such action. Such a vote need not itself occur during a meeting and could properly be taken by circulating a written ballot or tally sheet. If such a vote is taken during a meeting, the discussion and vote must of course be open to the public unless within one of the exemptions.

A copy of each vote on closing a meeting must be made available to the public whether or not the meeting or portion is closed. This will inform the public as to the full voting record of each agency member on openness questions. When a vote on the issue of closing fulfills the requirements for closing, a full written explanation of the action and a list of all persons expected to attend the meeting must also be made public.

Agencies are required to public announce, at least one week prior to a meeting, its date, location, and other relevant information.

The keeping of a complete, verbatim transcript or electronic recording of each portion of a meeting closed to the public would be required (except for discussions dealing with adjudications or agency participation in civil actions), and any portion of each transcript or recording whose release would not have the effect set forth in one or more of the exemptions would have to be made available to the public. Information may be deleted only if it falls within an exemption and disclosure is not required by the public interest, and deletions would be replaced by a written explanation of the reason and the statutory authority for each. Written minutes of open meetings will also be required to be kept and made publicly available.

Any person could challenge in court the closing of a meeting or any other violation of the openness requirements of the bill, and the burden

of sustaining the closing or other action in question would be upon the agency. The court could grant any appropriation relief, including but not limited to enjoining future violations of the act or releasing the transcript of an improperly closed meeting.

Ex Parte Communications

Section 4 of the bill would enact a general prohibition on ex parte communications between agency decisionmaking personnel, including commissioners and administrative law judges, and outside persons having an interest in the outcome of a pending proceeding. These provisions would apply to executive agencies without regard to whether they are headed by a collegial body or a single individual.

The communications prohibited by the ex parte section would include only those relative to the merits of the proceeding. Thus, an inquiry of an agency clerk as to the procedural status of an adjudication or rulemaking matter would not be unlawful under the bill. A violation of the prohibition could result in sanctions up to and including loss of the proceeding on the merits (as under existing case law). *See, e.g., Jacksonville Broadcasting Corp.* v. *FCC*, 348 F.2d 75 (D.C. Cir.), *cert. denied*, 382 U.S. 893 (1965).

History of the Legislation

This legislation represents a further, logical step in the continuing process of opening governmental decisionmaking to the public at the Federal and State levels.

The Freedom of Information Act, making documents of executive departments and agencies generally available to the public, was enacted in 1966 (Public Law 89–487, 80 Stat. 250) and codified as section 552 of title 5, United States Code, the following year (Public Law 90–23, 81 Stat. 54).

In 1972, Congress enacted the Federal Advisory Committee Act (Public Law 92–463, 86 Stat. 770, 5 U.S.C. App. I), designed to open to the public the meetings of advisory committees, study panels and ad hoc committees in the executive branch.

In 1974, after eight years of experience under the Freedom of Information Act and several series of oversight hearings and studies, Congress enacted strengthening amendments to that statute (Public Law 93–502, 88 Stat. 1561).

In March 1973, the House adopted H. Res. 259, generally requiring meetings of House committees (including markup sessions) to be open to the public. On November 5, 1975, the Senate adopted S. Res. 9, opening to public observation markups and other sessions of Senate committees. The adoption of S. Res. 9 also completed the necessary action to open meetings of conference committees (the House action in this regard had been taken earlier in 1975 by H. Res. 5, but the effectiveness of the House provision had been stayed pending the adoption of a similar rule by the Senate).

The present legislation relates only to open meetings of agencies in the executive branch. It made its first congressional appearance in

1972 (H.R. 16450, 92d Cong., 2d Sess.) and was reintroduced in the 93d Congress with a total of almost 50 co-sponsors. In the present Congress, various versions of the legislation in the House have a total of 85 co-sponsors.

The Senate Government Operations Subcommittee on Executive Reorganization held hearings on S. 260, a counterpart to H.R. 11656, in 1974, and passed S. 5, a similar measure, on November 6, 1975, by a vote of 94–0.

Hearings

The Government Information and Individual Rights Subcommittee held hearings on H.R. 10315 and H.R. 9868, earlier versions of this legislation, on November 6 and 12, 1975. Witnesses included representatives of executive agencies, the press, the bar, and the public.

Committee Vote

At a meeting of the full Committee on Government Operations on March 2, 1976, a quorum being present, H.R. 11656, as amended, was approved and ordered reported by a vote of 32 ayes to 7 nays.

Statement Pursuant to Clause 7(a) of Rule XIII

The committee estimates that the ex parte provisions of the legislation will result in no additional costs.

The committee anticipates that most of the costs incurred in connection with the open meeting provisions will be for the clerical and administrative work they require. The committee estimates that such costs will be minimal.

Under the bill, most agency meetings will be open to the public and will therefore not require transcripts or electronic recordings. In most instances, minutes are already taken at such meetings, so the only additional expense will be that of duplicating one or more sets of the minutes to be made available to the public. (Ordinarily, a member of the public desiring his own set of the minutes will bear the expense of copying.) The only other cost of an open meeting under this legislation is that of the public announcement; this too, should be negligible.

An agency closing a portion of a meeting will have to make a transcript or electronic recording thereof. Thus, the more frequently an agency closes meetings, the greater will be the cost. Considering the approximately 50 covered agencies as a whole, the committee estimates that relatively few portions of meetings will be closed and that the costs associated with closings will therefore be minimal. This cost will be further reduced if an electronic recording device, rather than stenographic notation, is used. The cost of electronic recording equipment estimated at a few thousand dollars per covered agency. The cost of transcription will be borne in large measure by members of the public requesting copies of transcripts.

The committee's estimate comports with that provided by the Comptroller General.

Statement Pursuant to Clause 2(l) of Rule XI

(A) No oversight findings or recommendations have been made with regard to this measure.

(B) This measure does not provide for additional budget authority.

(C) The estimate and comparison prepared by the Director of the Congressional Budget Office under section 403 of the Congressional Budget Act of 1974 follow. Unless otherwise stated, all figures represent cumulative totals for the approximately 50 agencies covered by the open meeting provisions of the bill:

COST ESTIMATE

Any projections of the costs of the "Sunshine Act" has to be tentative since the number of recording devices it will be necessary to buy and the amount of clerical time involved is difficult to estimate. With this limitation, the costs of making the proceedings of closed meetings available to the public could be $30,000 for new recording equipment and $130,000 annually for additional clerical help. Assuming a starting date of July 1, 1977, the budget impact would be:

Transition quarter	[1] 62,500
Fiscal year 1977	130,000
Fiscal year 1978	[2] 138,000
Fiscal year 1979	145,000
Fiscal year 1980	152,000
Fiscal year 1981	160,000

[1] $30,000 for recording devices, 25 percent of $130,000 in personnel costs.
[2] Salaries are tied to the changes in the CPI at a 5-percent real growth rate in GNP.

BASIS OF ESTIMATE

The cost of a conference recording device should be about $400. This analysis has assumed that half of the fifty or so agencies in question will purchase one new recording machine, and that the other half will require two.

As for hiring additional clerical help, the assumption here is that one-quarter of the fifty agencies will do so at an average salary of $10,000 annually. If Congressional expectations that there will be few closed meetings are realized, this estimate on personnel could be on the high side of the spectrum.

ESTIMATE COMPARISON

Senate Report 94–354 estimates that the cost per agency will be a few thousand dollars. The CBO cost projections are also in that range.

Statement Pursuant to Clause 2(l)(4) of Rule XI

The enactment of this bill into law is not expected to have any inflationary impact on prices or costs in the operation of the national economy.

Section-By-Section Analysis

SECTION 1

Section 1 provides that this act may be cited as the "Government in the Sunshine Act."

SECTION 2

Section 2 declares that it is the policy of the United States that the public is entitled to the fullest practicable information regarding the decisionmaking processes of the Federal Government, and that it is the purpose of this act to provide the public with such information to the maximum extent possible without infringing the rights of individuals or significantly interfering with the ability of the Government to carry out its substantive responsibilities.

SECTION 3

Section 3 adds a new section 552b, entitled "Open meetings", to title 5 of the United States Code.

Subsection (a)

Subsection (a) defines certain terms employed in section 552b. Since section 552b will be part of chapter 5 of title 5, United States Code, the definitions contained in existing section 551 also apply to it unless inconsistent with the definitions in subsection (a).

The term "agency" includes (1) any Federal agency, as defined under the Freedom of Information Act (5 U.S.C. § 552(e)), which is headed by a collegial body composed of two or more members, a majority of whom are appointed by the President with the advice and consent of the Senate, (2) any subdivision thereof authorized to act on behalf of the agency (without regard to the number of members composing or included in the subdivision), and (3) the Federal Election Commission. Though a single agency head, his deputy, and his assistants may "head" an agency in the colloquial sense, they do not have common duties and thus are not a collegial body, and their agency would not come within this definition. On the other hand, while the chair of a commission that heads an agency may have certain responsibilities over and above those of his or her fellow commissioners, his or her position as *primus inter pares* would not remove the agency from the coverage of section 552b.

A subdivision of an agency covered under section 552b is covered if it is authorized to act on behalf of the agency. Panels, or regional boards of an agency are covered if authorized to act on behalf of the agency, even if their action is not final in nature. Thus, panels or boards authorized to submit recommendations, preliminary decisions, or the like to the full commission, or to conduct hearings on behalf of the agency are required to comply with the provisions of section 552b.

While the definition of agency does not include advisory committees generally, it does include other bodies composed of part-time Govern-

ment employees which meet from time to time to review agency activities and give guidance to staff, approve staff actions, review and approve the agency's proposed budget, and so forth. Such a board or group would come within the definition of an agency even though day-to-day supervision might be provided by a single administrator. A specific provision as to the applicability of the Federal Advisory Committee Act, 5 U.S.C. App. I, is contained in subsection (o) of section 552b.

The use of a generic definition for the agencies covered by the bill parallels the Administrative Procedure Act, 5 U.S.C. § 551(1), the Freedom of Information Act, 5 U.S.C. § 552, and the Privacy Act of 1974, 5 U.S.C. § 552a.

Meeting

The term "meeting" means the deliberations of at least the number of agency members required to take action on behalf of the agency, where such deliberations concern the joint conduct or disposition of agency business. The word "deliberations" includes not only a gathering of the requisite number of members in a single physical place, but also, for example, a conference telephone call or a series of two-party calls involving the requisite number of members and conducting agency business. The conduct of agency business is intended to include not just the formal decisionmaking or voting, but *all* discussion relating to the business of the agency. The limitation of the definition to "joint" conduct is intended to exclude a situation where the requisite number of members is physically present in one place but not conducting agency business as a body (as, e.g., at a meeting at which one member is giving a speech while a number of his fellow members are scattered throughout the audience). It does not exclude the situation where a subdivision authorized to act on behalf of the agency meets with other individuals concerning the conduct or disposition of agency business.

Member

The term "member" means an individual who belongs to a collegial body heading an agency. Such an individual is a member for the purposes of section 552b even if not appointed by the President and confirmed by the Senate, so long as a majority of the members of the body are so appointed and confirmed.

Subsection (b)

Subsection (b) sets forth the basic principle of section 552b, namely, that unless specifically exempted by subsection (c), every portion of every meeting must be open to public observation. The presumption in every instance is that a meeting shall be open to the public, and this presumption may be overcome only by a preponderant showing that the portion proposed to be closed clearly comes within one of the exemptions contained in subsection (c).

The phrase "open to public observation," while not affording the public any additional right to participate in a meeting, is intended to guarantee that ample space, sufficient visibility, and adequate acoustics will be provided.

Subsection (c)

Subsection (c) sets forth the circumstances under which a meeting or portion thereof may be closed to the public, and under which specified information developed in such a meeting or portion need not be disclosed to the public. The subsection contains 10 exemptions to the general rule of openness set forth in subsection (b), but provides that even if a meeting or information falls within one of them, it shall not be closed (or, in the case of information, withheld), if the public interest requires otherwise. This balancing procedure is to be performed by the agency in the first instance.

The provision permits closing where the agency properly determines that the discussion is likely to come within one or more of the exemptions. It lets the agency withhold information contained in a transcript or recording where the disclosure of the information would in fact have the effect set forth in one or more exemptions. The burden of sustaining a closing or withholding is at all times upon the agency.

The specific exemptions are:

(*1*) Exemption 1 covers matters that are specifically authorized under criteria established under an Executive order to be kept secret in the interests of national defense or foreign policy and are in fact properly classified pursuant to such Executive order. No matters may be withheld under this exemption unless they meet both requirements. In order for material to be "properly classified", it must have been originally classified pursuant to the applicable Executive order, remain entitled to such classification, and currently be protected from loss or compromise pursuant to the provisions of the Executive order.

Under subsection (h) of section 552b, a court considering whether this or any other exemption has been properly invoked may examine the transcript or electronic recording of the meeting in camera, and may take any other evidence it deems necessary.

(*2*) This exemption includes meetings relating solely to an agency's internal personnel rules and practices. It is intended to protect the privacy of staff members and to cover the handling of strictly internal matters. It does not include discussions or information dealing with agency policies governing employees' dealings with the public, such as manuals or directives setting forth job functions or procedures. As is the case with all of the exemptions, a closing or withholding permitted by this paragraph should not be made if the public interest requires otherwise.

(*3*) This paragraph permits closing or withholding where a statute other than section 552b requires the withholding of the information in question and establishes particular criteria defining such information or refers to particular types of information. A statute that merely permits withholding, rather than affirmatively requiring it, would not come within this paragraph, nor would a statute that fails to define with particularity the type of information it requires to be withheld.

Thus, for example, section 1104 of the Federal Aviation Act of 1958, (49 U.S.C. § 1504), which allows the Federal Aviation Administration to withhold from the public any FAA material when he believes that "a disclosure of such information * * * is not required in the interest of the public," would not qualify under this exemption. *See Adminis-*

trator, *FAA* v. *Robertson*, 422 U.S. 255 (1972). Similarly, the Freedom of Information Act (5 U.S.C. 552), which permits but does not require the withholding of information would not come within this exemption; and the Trade Secrets Act (18 U.S.C. § 1905), which relates only to the disclosure of information "not authorized by law," would not permit the withholding of information whose disclosure is required under the Freedom of Information Act or under this act, since FOIA and this act authorize its disclosure. (In connection with section 1905, see *Charles River Park "A", Inc.* v. *Dept. of Housing and Urban Development*, 519 F. 2d 935, 941 n. 7 (D.C. Cir. 1975), and cases there cited.)

Examples of statutes that could justify a closing or withholding under paragraph 3 include sections 706(b) and 709(e) of the Civil Rights Act of 1964, as amended (42 U.S.C. § 2000e–5(b), 2000e–8(e)), and section 314(a)(3) of the Federal Election Campaign (2 U.S.C. § 437g(a)(3)), which require the Equal Employment Opportunity Commission and the Federal Election Commission, respectively, to withhold certain information relating to informal conciliation and enforcement efforts, and section 801 of the Federal Aviation Act of 1958 (49 U.S.C. § 1461), which prohibits the Civil Aeronautics Board from publishing certain information relating to a foreign air route application prior to its submission to the President for his decision on the route award.

(*4*) This exemption, which is identical to the trade secrets exemption of the Freedom of Information Act, 5 U.S.C. § 552(b)(4), protects trade secrets and commercial or financial information obtained from a person and privileged or confidential. A "trade secret" has been defined judicially as:

> An unpatented, secret, commercially valuable plan, appliance, formula, or process, which is used for the making, preparing, compounding, treating, or processing of articles or materials which are trade commodities. *United States ex rel. Norwegian Nitrogen Products Co.* v. *United States Tariff Comm.*, 6 F. 2d 491, 495 (D.C. Cir. 1925), *rev'd on other grounds*, 274 U.S. 106 (1927).

This exemption also includes matter subject to certain evidentiary privileges (doctor-patient, attorney-client) and confidential commercial or financial information. The adoption of language following that in the Freedom of Information Act is with recognition of judicial interpretations of the FOIA exemption.

(*5*) Exemption (5) covers discussions that involve accusing any person of a crime or formally censuring any person. In order to be covered by this paragraph, the discussion must relate to a specified person or persons and, if possible criminal violation is at issue, a specific crime or crimes. Further, the agency must be considering a possible action of a formal nature against the person in question.

Although the statute contains a general presumption in favor of open meetings, this exemption balances that presumption against the individual's right of privacy. Unless the public interest requires otherwise, this exemption permits an agency to close a discussion that deals with and precedes a decision whether to take formal action against an individual.

(*6*) This paragraph permits the closing of a meeting where the discussion would reveal personal information whose disclosure would constitute a clearly unwarranted invasion of personal privacy. Like exemption (5), this paragraph balances the need for openness against the individual's right to privacy. It would, for example, allow the closing of a discussion of an individual's health or alleged drinking habits.

In addition to the applicability of the general rule that allows such a discussion to be open if that is in the public interest, the committee notes that there may be circumstances where the official status of the individual in question affects whether this exemption should be invoked (e.g., a discussion of an individual's competence to perform his job might be open if he is a high government official, but closed if he is of a lower rank or a private citizen). *Compare New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), *with Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974).

Since the primary purpose of this exemption and of exemption (5) is to protect the privacy of the person in question, the exemptions should not ordinarily be utilized to close a meeting that the subject would prefer to have open.

(*7*) This paragraph applies to meetings which disclose information from investigatory records compiled for civil or criminal law enforcement purposes. A meeting could be closed, however, only to the extent that disclosure of records would interfere with enforcement proceedings; deprive a person of a right to a fair trial or an impartial adjudication; constitute an unwarranted invasion of personal privacy; disclose the identity of a confidential source; disclose confidential information furnished only by a confidential source in the course of a criminal or national security intelligence investigation; disclose investigative techniques and procedures; or endanger the life or physical safety of law enforcement personnel. This exemption recognizes that premature public disclosure of certain matters concerning an investigation could jeopardize these investigations and hinder the ability of the agencies to fulfill their statutory duties.

To justify closing under this exemption, the records in question must relate to a specific person or persons. The fact that the identity of a confidential source may be withheld does not justify the withholding of information secured from such a source which does not in and of itself reveal the identity of the source. Another governmental agency may not be a "confidential" source, as the intent of subparagraph (D) is to protect citizen informants and like sources.

An investigation may not be a "lawful" national security investigation unless it is carried on within the Constitution and applicable laws. Thus, a discussion involving the records of unlawful activities in such programs as CHAOS, COINTELPRO, and illegal CIA and FBI mail opening does not involve a lawful national security investigation.

The provision relating to investigative techniques and procedures does not include matters already known to the public. Thus, although a meeting might be closed if it concerns a new technique for crime detection only to the extent that the discussion is likely to bring out aspects of it not already made public through judicial proceedings, news stories, and the like.

The provision relating to an invasion of personal privacy is limited to the privacy of an individual. See Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act 9 (1975).

(*8*) This exemption applies to meetings which would, if open, disclose information contained in or relating to examination, operating, or condition reports on financial institutions. Such reports are prepared by or for such bank regulatory agencies as the Federal Deposit Insurance Corporation, the Federal Home Loan Bank Board, and the Federal Reserve Board. This provision is identical to exemption (8) of the Freedom of Information Act.

(*9*) This exemption protects information whose premature disclosure would have certain adverse affects. Subparagraph (A), which applies solely to agencies that regulate securities, currencies, commodities or financial institutions, includes information whose disclosure would be likely to lead to significant financial speculation or to significantly endanger the stability of any financial institution. This subparagraph would cover many of the regulatory activities of such agencies as the Federal Reserve Board and the Securities and Exchange Commission.

Subparagraph (9) (B) applies to all agencies and protects information whose premature disclosure would be likely to significantly frustrate an agency action that has not yet taken place. This provision does not apply to such information, though, if the content or nature of the proposed action has already been disclosed to the public by the agency or the agency is required by law to disclose it to the public before final approval of the action. In the case of rule making, for example, where an agency has or will be required to publish the proposed rule for notice and comment prior to placing it in effect, subparagraph (9) (B) would not permit closing of a discussion of the proposal.

If it is not already covered by exemption (2) an agency's discussion of its strategy in labor negotiations, or a Civil Service Commission discussion of labor negotiation strategy for other agencies, could come within paragraph (9) (B).

As with several other exemptions, exemption (9) employs a balancing test between the presumption in favor of openness and the need to delay the disclosure of certain information in the interest of proper administration. The use of the words "significant" and "significantly" is intended to limit closings under this paragraph to instances wherein disclosure at the time in question would have a considerable adverse effect.

(*10*) This paragraph includes discussions specifically concerning the agency's issuance of a subpoena, participation in a civil action, an action in a foreign court or international tribunal, or an arbitration, or the initiation, conduct, or disposition by the agency of a particular case of formal adjudication involving a determination on the record after opportunity for a hearing (whether or not pursuant to 5 U.S.C. § 554).

A discussion of whether to commence a civil action or adjudicatory proceeding, or to formally request the Justice Department to commence a civil action, is included within the ambit of this exemption.

Among the reasons for this exemption are the need to allow an agency to discuss in private its strategy in litigation in which it is

involved and the fact that, when acting in an adjudicatory proceeding, the agency is relying upon the written record and acting in a quasi-judicial fashion.

Of course, if the public interest or another provision of law (see discussion of subsection (m), *infra*) so requires, a discussion falling within the literal terms of this or any other exemption must be open to the public.

Subsection (d)

Subsection (d) sets forth the procedures governing the closing of meetings, or portions of meetings, subject to the criteria set forth in subsection (c).

Subsection (d)(1) allows the closing of a meeting or the withholding of information only when a majority of the agency members votes to take such action, and requires a separate vote for each meeting a portion or portions of which are proposed to be closed. There is no requirement that a vote on whether to close a meeting must itself be taken at a meeting, and the seriatim marking of a written tally sheet would be a permissible means of taking such a vote. If, though, a vote on whether to close a meeting is taken at that meeting or a prior meeting, the vote and all discussion leading up to it must be open unless closed under one of the exemptions set forth in subsection (c).

Subsection (d)(1) permits a single vote to be taken with respect to a series of portions of meetings if all are to be held within thirty days after the first and all involve the same particular item (i.e., not just a general discussion of a generic subject).

No proxy votes may be cast in a vote on whether to close a meeting, and the vote of each agency member must be recorded so as to permit identification by name of how each member has voted.

Subsection (d)(2) permits any person whose interests may be directly affected by a portion of a meeting to request that it be closed under exemption (5) (accusation of a crime), (6) (personal privacy) or (7) (investigatory records). If any agency member so requests, the agency must vote by recorded vote whether to close the meeting in response to the request.

Subsection (d)(3) requires that within one day after a vote on whether to close a meeting or withhold information, the agency must make publicly available a written statement setting forth the vote of each member. All such votes must be made public in this manner, even if the decision has been to keep the meeting open or to release the information in question. This will enable the general public to be aware of an agency member's overall voting record on openness questions.

Subsection (d)(3) also requires, that if a meeting is to be closed to the public, the agency shall, within one day after the decision to close is reached, make publicly available a full written explanation of the action and a list of the names and affiliations of all persons expected to attend the meeting. Such an explanation should note the paragraph or subparagraph of subsection (c) which is the basis for the closing, and should explain how the discussion falls into that exemption and the factors that were considered in reaching the deci-

sion to close. It should in every instance be as detailed as possible without revealing the exempt information.

This subsection and others in the bill require that certain information be made available to the public. The committee, desiring to avoid the expense and delay attendant upon requiring publication of such matter in the Federal Register, has not mandated this in any instance. The committee does intend, though, that all reasonable means be used to assure that the public is fully informed of such information. Means of publicizing such information should include posting notices on the agency's public notice boards, publishing them in publications whose readers may have an interest, and sending them to the individuals on the agency's general mailing list or a mailing list maintained for those who desire to receive such material. Publication in the Federal Register, while not mandated by the bill, provides a further potential means of publicizing these announcements and should be used wherever possible.

Subsection (d)(4) permits any agency a majority of whose meetings may properly be closed pursuant to exemptions (4), (8), (9)(A), or (10) to provide by regulation for the use of an expedited procedure for the closing of meetings coming within those exemptions. Closings under this paragraph will not be subject to the following requirements normally imposed by the bill: providing one week's advance notice of the meeting; taking a vote on whether close prior to the time of the meeting; providing an explanation for the closing; providing advance notice of the name of an official who will respond to requests for information about the meetings; and taking a vote of the agency membership to change the agenda for a meeting after it has originally been announced.

Closing will be permitted under this provision only if the agency so votes by recorded vote no later than the beginning of the meeting or portion in question and gives public notice of the date, place and subject matter of each portion of the meeting at the earliest practicable time and in no case later than the commencement of the meeting or portion. While the vote to close is not required to be made public within one day after it is taken, it must be made public as promptly as is physically possible.

Subsection (d)(4) will simplify closing procedures for agencies regulating securities, commodities, and financial institutions, who must often meet on very short notice, and agencies whose primary or sole responsibility is to conduct adjudicatory proceedings. Examples of agencies expected to qualify under this paragraph are the Securities and Exchange Commission, the Federal Reserve Board and the National Labor Relations Board.

Subsection (e)

This subsection requires a week's public notice of the date, place, and subject matter of a meeting, as well as whether it is to be open or closed and the name and telephone number of an agency official who will respond to requests for information regarding the meeting. The one-week period may be shortened if a majority of the agency membership votes by recorded vote that the agency business so requires, in which case the announcement shall be made at the earliest practicable time and in no case later than the commencement of the

meeting or portion in question. Such a vote shall be made public as promptly as it physically possible.

No change may be made in any of the items required to appear in the meeting notice once it has been made public except by a recorded vote of the majority of the agency upon a determination that the agency business requires the change and that no earlier announcement thereof was possible. The agency must announce the change and the vote of each member at the earliest practicable time and in no case later than the commencement of the meeting or portion in question.

The subject-matter identification required by this subsection must be of a specific nature, e.g., the docket names or titles and numbers, rather than a general statement as to the generic subjects to be discussed. Affording the public less than one week's notice, or making changes after the meeting has been publicly announced, should occur only on an emergency basis.

Subsection (f)

Subsection (f)(1) requires that a complete, verbatim transcript or electronic recording be made of any meeting or portion closed to the public, except for meetings closed under exemption (10) (civil actions and adjudications). Once the meeting has been concluded and the transcript or recording prepared, the agency must make public such portions of it as it determines (by recorded vote) not to contain information exempt from disclosure under subsection (c). In place of each deletion, the agency must supply a written explanation of the reason therefor and the identity of the statute said to permit the deletion. This explanation would not be required to disclose exempt information.

The transcript or recording must be made easily accessible to the public and available for inspection without charge. If made available in the form of a recording, provision must be made so that the identity of each speaker is disclosed. The agency must furnish copies of the transcript (or transcription of the recording) at no greater than the actual, direct cost of duplication; if the public interest so requires, copies shall be made available without charge.

A complete copy of the transcript or recording must be maintained for two years after the meeting or until one year after the conclusion of the proceeding in question, whichever occurs later.

The premise of this bill is that almost all agency meetings will be open, and that as a result, relatively few transcripts or recordings will have to be made. One reason for requiring a transcript or recording is that, once a closed meeting is actually held, most or all of it may turn out to be non-exempt. The existence of the transcript or recording allows the release of the discussion as soon as this fact becomes apparent (albeit after the meeting has been held). A second reason, related to judicial review, is discussed under subsection (h), *infra*.

Within a transcript or recording, deletions should be made only where the deleted material is exempt under subsection (c). Of course, the agency must maintain in its files a complete copy, without any deletions, for the period set forth in the last sentence of subsection (f)(1).

Agency fees for duplication should be uniform and contained in published regulations, as is the case under the Freedom of Information Act. Fees must not exceed the actual, direct cost of duplication (in the

case of a transcript) or transcription (for a recording) and, when in the public interest, or primarily of benefit to the public, the material should be furnished without charge. In no instance should fees be set with the purpose of discouraging public requests for transcripts or transcriptions; their sole purpose is to permit recovery of some or all of the direct cost of providing them.

Subsection (f)(2) requires that written minutes be made of all meetings open to the public, and that they be made available for public inspection without charge. Copies are to be furnished to the public at no greater than the actual, direct cost of duplication or, if in the public interest without charge. The minutes shall be maintained for a period of at least two years after the meeting.

Most, if not all agencies already keep minutes of their meetings. This provision would permit an individual who is unaware of or unable to attend an open meeting to ascertain with ease what transpired there.

Subsection (g)

This subsection required each agency, within 180 days after the date of enactment of this section and following consultation with the Office of the Chairman of the Administrative Conference of the United States and 30 days' notice for comment in the Federal Register, to promulgate regulations to implement subsections (b) through (f). Should an agency fail to promulgate regulations within the 180-day period, any person may bring a proceeding in the United States District Court for the District of Columbia to require promulgation.

Once regulations have been promulgated by an agency, they are subject to challenge by any person in the United States Court of Appeals for the District of Columbia Circuit. Such a proceeding would be subject to the same statute of limitations as any other proceeding challenging a rule-making order of the agency in question. *See, e.g.*, 28 U.S.C. § 2344, 47 U.S.C. § 402 (c). This limitation of time for a direct challenge to the regulations is of course not intended to limit the right of a litigant to question their validity when they are applied to him at some later date. *Functional Music, Inc.* v. *FCC*, 274 F.2d 543 (D.C. Cir. 1958), *cert. denied*, 361 U.S. 813 (1959).

Subsection (h)

Subsection (h) permits any person to bring an action in a United States District Court against an agency or any members thereof to enforce the requirements of subsections (b) through (f). Such a suit must be commenced no later than 60 days after the meeting in question, except that if public announcement in accord with this section is not made, the plaintiff may commence his action at any time up to 60 days after a public announcement of the meeting is in fact made. As in subsections (d) and (e), any public announcement must be made in a manner calculated to assure its wide dissemination in order to qualify as a "public announcement" as that term is used herein. The plaintiff need not pursue any remedies or appeals within the agency prior to bringing suit under this subsection.

An action may be brought in the district wherein the plaintiff resides or has his principal place of business, or where the agency in question has its headquarters. Venue provisions permitting the plaintiff to sue where he resides are applicable generally to actions against officers of the United States, 28 U.S.C. § 1391(e), as well as in actions under

the Freedom of Information Act, 5 U.S.C. § 552, and the privacy Act of 1974, 5 U.S.C. § 552a.

The defendant must serve his answer to a complaint in such an action within 20 days after the complaint is served upon him, and the court may extend this limit for up to 20 additional days upon a showing of good cause therefor. A showing of good cause requires not merely a conclusory recital that additional time is required, but an affidavit setting forth facts which justify an extension in the particular case.

The burden of proof is upon the agency to sustain the closing, withholding of information, or other action alleged to have been taken improperly. The reasons for this requirement are two: first and foremost, the presumption is in favor of openness; and second, the agency will in almost every instance be in exclusive possession of the facts relevant to the agency decision.

In considering a case under this section, the court may examine in chambers any portion of a transcript or electronic recording of a closed meeting, and may also take an additional testimonial or documentary evidence it deems necessary.

The court may award any appropriate relief (other than money damages), including an injunction against future violations of this section or a declaratory judgment that a certain practice or policy is unlawful. The court may also order the release of any portion of the transcript, recording, or transcription as does not contain information specifically exemplified from disclosure under subsection (c). The court, when acting solely under this subsection, is not authorized to set aside, enjoin, or invalidate any substantive agency action taken or discussed at the meeting in relation to which a violation of this section occurred.

The power of the court to release the non-exempt portion of a transcript, recording, or transcription of an unlawfully closed meeting points up another reason for requiring such records to be made. Since a judicial determination that a meeting was unlawfully closed will in most instances come long after the meeting has been held, and since the substantive action taken at the meeting cannot be nullified when the court is acting solely under this subsection, the possibility of finding out what transpired at the meeting represents the only realistic remedy available to a plaintiff.

Subsection (i)

This subsection authorizes a court otherwise empowered by law to review an agency action to consider in the course of its review whether the agency violated this section. This provision does not make reviewable any action that is not reviewable on another basis, nor does it make applicable to a proceeding for review of a substantive agency action the limitations of time and other procedural aspects of judicial review under subsection (h). A court reviewing compliance with this section under subsection (i) may afford any relief it deems appropriate. This might, in a rare instance, include nullification of the substantive agency action.

Subsection (j)

Subsection (j) authorizes the court to assess against any party reasonable attorney fees and other litigation costs reasonably incurred by any other party who substantially prevails in an action brought

under subsection (g), (h), or (i), except that costs may be assessed against an individual agency member only where the court finds that he has intentionally and repeatedly violated this section, and against the plaintiff only where the action was commenced primarily for frivolous or dilatory purposes. When costs are assessed against an agency, the court may assess them against the United States in lieu of the agency or may permit the plaintiff to elect whether to have them assessed against the agency or the United States.

While the concept of rendering individual agency members liable for attorney fees (albeit only in extraordinary instances) appears to be a novel one in Federal law, the committee notes that the Privacy Act of 1974, 5 U.S.C. § 552a, contains criminal penalties for violations, and that the Freedom of Information Act, 5 U.S.C. § 552, requires the Civil Service Commission to institute disciplinary proceedings where agency personnel act arbitrarily or capriciously in withholding documents thereunder. Further, of the 49 states that have open meeting laws, 24 impose criminal penalties for violations by government officials, two more provide for civil penalties, and 19 render the substantive action taken at an unlawfully closed meeting void or voidable.

The provision for liability on the part of a plaintiff or individual agency member should rarely have to be used, and any invocation of it should be attended by notice, an opportunity to be heard, and any other applicable aspects of due process of law.

Subsection (k)

This subsection requires each agency subject to this section to report annually to Congress regarding its compliance, including a tabulation of the total number closed to the public, the reasons for closings, and a description of any litigation brought against the agency under this section (including any costs assessed against the agency).

Subsection (l)

This subsection provides that this section is not intended to alter rights under the Freedom of Information Act, 5 U.S.C. § 552, except as expressly provided. The provisions of this section, rather than the Freedom of Information Act, shall apply to transcripts or recordings made in order to comply with this section; as is the case under that act, however, the agency must demonstrate that the material in a transcript would, if released, have the effect protected under subsection (c). Since these items must be retained for a specific time period under subsection (f)(1), this subsection removes them from the coverage of the Federal Records Act, 44 U.S.C. § 3301 et seq., which contains general standards for the disposal of agency records.

Subsection (m)

Subsection (m) provides that this section does not constitute authority to withhold information from Congress and does not authorize the closing of any agency meeting otherwise required by law to be open.

Subsection (n)

Subsection (n) provides that if a record, including a transcript or electronic recording made pursuant to this section, is accessible to an individual under the Privacy Act of 1974, 5 U.S.C. § 552a, it may not be withheld from him on the basis of this section.

80-459 O - 77 - 35

Subsection (o)

Subsection (o) provides that in the event any meeting is subject to the provisions of the Federal Advisory Committee Act, 5 U.S.C. App. I, as well as the provisions of this section, the provisions of this section shall govern. An example of this is a meeting between the collegial body heading an agency and one of the agency's advisory committees.

Section 4

Section 4 would establish for the first time a definite, general statutory statement as to the limitations and procedures governing ex parte communications with respect to agency proceedings. At present, such limitations and procedures are governed by agency rules and by constitutional standards, neither of which have the clarity, uniformity, and general public availability of a statute.

Section 4(a) adds a new subsection (d) to 5 U.S.C. § 557, enacting the general prohibition ex parte communications relative to the merits of a pending proceeding between an agency decision making official and an interested person outside the agency. The subsection also requires placing such communications on the public record if they do occur.

The prohibition only applies to formal agency adjudication. Informal rulemaking proceedings and other agency actions that are not required to be on the record after an opportunity for a hearing will not be affected by the provision.

The ex parte rules established by this section are not intended to repeal or modify the ex parte rules agencies have already adopted by regulation, except to the extent the regulations are inconsistent with this section. If an agency already has more stringent restrictions against ex parte contacts, this section will supplement those provisions. It is expected that each agency will issue new regulations applying the general provisions of this section in a way best designed to meet its special needs and circumstances.

The rule forbids ex parte communications between interested persons outside the agency and agency decisionmakers. The provision exempts only those ex parte communications authorized by law to be disposed of in such a manner. This exemption might include, for example, requests by one party to a proceeding for subpoenas, adjournments, and continuances.

Paragraph (1)(A) forbids contacts between an interested person outside the agency and any agency member, administrative law judge, or other employee involved in the decisionmaking process. The word "employee" includes both those working for the agency full time and individuals working on a part-time basis, such as consultants.

The term "interested person" is intended to be a wide, inclusive term covering any individual or other person with an interest in the agency proceeding that is greater than the general interest the public as a whole may have. The interest need not be monetary, nor need a person to be a party to, or intervenor in, the agency proceeding to come under this section. The term includes, but is not limited to, parties, competitors, public officials, and nonprofit or public interest organizations and associations with a special interest in the matter regulated. The term does not include a member of the public at large

who makes a casual or general expression of opinion about a pending proceeding.

The rule applies to interested persons who "make or cause to be made" an ex parte communication. The latter phrase contemplates indirect contacts which the interested person approves or arranges. For example, an interested person may ask another person outside the agency to make an ex parte communication. The section would apply to the individual who requested that the communication be made. However, if the second person contacts the agency about the first individual's interest in the case without that person's knowledge, approval, or encouragement, the first person would not be guilty of causing an ex parte contact.

Contacts are prohibited with any agency member, administrative law judge, or other employee who is or may reasonably be expected to be involved in the agency's deliberations. The words "may reasonably be expected" make it clear that absolute certainty is not required when predicting whether an agency employee will be involved in the decisional process. In some cases it will be clear that an employee does not come within the ambit of the provision. For example, an agency attorney litigating the case for the agency will not be involved in the decisionmaking process of the agency and would not be subject to the ex parte provision. Under other circumstances, the official's status may not be so clear. In such case, the fact that an interested person chooses to communicate with a particular employee in an ex parte manner is itself some evidence that the official may reasonably be expected to be involved in the decisional process. To assist the parties and the public in determining which agency officials may be involved in the decisional process, an agency may wish to publish, along with notice of the proceeding, a list of officials expected to be involved in the decisional process. The ex parte rules would still apply to an agency official involved in the decisional process even if he were not on such a list.

Communications solely between agency employees are excluded from the section's prohibition. Of course, ex parte contacts by staff acting as agents for interested persons outside the agency are clearly within the scope of the prohibitions.

The subsection prohibits an ex parte communication only when it is "relative to the merits of the proceeding." This phrase is intended to be construed broadly and to include more than the phrase "fact in issue" currently used in the Administrative Procedure Act. The phrase excludes procedural inquiries, such as requests for status reports, which will not have an effect on the way the case is decided. It excludes general background discussions about an entire industry which do not directly relate to specific agency adjudication involving a member of that industry, or to formal rulemaking involving the industry as a whole. It is not the intent of this provision to cut an agency off from access to general information about an industry that an agency needs to exercise its regulatory responsibilities. So long as the communication containing such data does not discuss the specific merits of a pending adjudication it is not prohibted by this section.

A request for a status report or a background discussion abont an industry may in effect amount to an indirect or subtle effort to influence the substantive outcome of the proceedings. The judgment will have to be made whether a particular communication could affect the

agency's decision on the merits. In doubtful cases the agency official should treat the communication as ex parte so as to protect the integrity of the decisionmaking process.

Paragraph (1)(B) is the inverse of paragraph (1)(A). It prohibits agency officials who are or who may be involved in the decisional process from engaging in an ex parte contact with an interested person. It embodies the same standards as paragraph (1)(A).

Paragraph (1)(C) states that if an ex parte communication prohibited by this subsection is made or received by an agency official, he must place on the proceeding's public record: (i) any written communication, (ii) a memorandum stating the substance of any such illegal oral communication, and (iii) any written statements, or memoranda of any oral statements made in response to the original ex parte communication. The "public record" of the proceeding means the public docket or equivalent file containing all the materials relevant to the case readily available to the parties and the public generally. Material may be part of the public record even though it has not been admitted into evidence.

The purpose of this provision is to notify the opposing party and the public, as well as all decisionmakers, of the improper contact and give all interested persons a chance to reply to anything contained in the illegal communication. In this way the secret nature of the contact is effectively nullified. Agency officials who make an ex parte conact are under the same obligation to record it publicly, as when an agency official receives such a communication. In some cases, merely placing the ex parte communication on the public record will not, in fact, provide sufficient notice to all the parties. Each agency should consider requiring by regulation that in certin cases actual notice of the ex parte communication to be provided to all parties.

Paragraph (1)(D) states that the officer presiding over the agency hearings in the proceeding may require a party who makes a prohibited ex parte communication to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded or otherwise adversely affected because of the violation. This provision accompanies section 4(c), which amends 5 U.S.C. S 556(d) to authorize an agency to consider a violation of this section as grounds for ruling against a party on the merits. Subparagraph (D) insures that the record contains adequate information about the violation. The presiding officer need not require a party committing an ex parte contact to show cause in every instance why the agency should not rule against him. The matter rests within his discretion. As in the case of subsection 4(c), the presiding officer should require such a showing only if consistent with the interests of justice and the policy of the underlying statutes. Thus, a showing should not be required where the violation was clearly inadvertent.

Paragraph (1)(E) requires that the prohibitions against ex parte communications apply as soon as a proceeding is noticed for a hearing. However, if a person initiating a communication before that time is aware that notice of the hearings will be issued, the prohibitions would apply from the time the person gained such awareness. An agency, if it wishes, may require that the provisions of this section apply at any point in the proceedings prior to issuance of the notice of hearings.

The new subsection 557(d) would also provide that section 557 is not authority to withhold information from Congress. While the pro-

hibitions on ex parte communications relative to the merits apply to communications from Members of Congress, they are not intended to prohibit routine inquiries or referrals of constituent correspondence.

Subsection 4(b) adds a definition of "ex parte communication" to the definitions contained in the Administrative Procedure Act. The term includes an "oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given." A communication is not ex parte if either, (1) the person making it placed it on the public record at the same time it was made, or (2) all parties to the proceeding had reasonable advance notice. If a communication falls into either one of these two categories, it is not ex parte. Where advance notice is given, it should be adequate to permit other parties to prepare a possible response and to be present when the communication is made. As in subsection (a), "public record" means the docket or other public file containing all the material relevant to the proceedings. It includes, but is not limited to, the transcript of the proceedings, material that has been accepted as evidence in the proceedings, and the public file of related matters not accepted as evidence in the proceeding. An individual who writes a letter concerning the merits of the proceeding to a commissioner, and who places a copy of the letter at the same time in the transcript of the proceedings, would not have made an ex parte communication. However, a party who wrote the same letter and sent it only to a commissioner, would have committed a violation of the section even if the commissioner subsequently placed the letter in the public record.

Subsection 4(c) amends section 556(d) of title 5, so as to authorize an agency to render a decision adverse to a party violating the prohibition against ex parte communications. It is intended that this provision apply to both formal parties and to intervenors whose interests are equivalent to those of a party. This possible sanction supplements an agency's authority to censure or dismiss an official who engages in an illegal ex parte communication, or to prohibit an attorney who violates the section from practicing before the agency. Such an adverse decision must be "consistent with the interests of justice and the policy of the underlying statutes."

For example, the interests of justice might dictate that a claimant for an old age benefit not lose his claim even if he violates the ex parte rules. On the other hand, where two parties have applied for a license and the applications are of relatively equal merit, an agency may rule against a party who approached an agency head in an ex parte manner in an effort to win approval of his license.

It is expected that an agency will rule against a party on the merits under this subsection only in rare instances, and in no case wherein the party demonstrates that the violation was inadvertent. However, the committee felt it very important that an agency have this option available where the circumstances justify it.

Section 5

Section 5(a) conforms 39 U.S.C. § 410(b)(1) to the open meeting provisions of this bill and the Privacy Act by clarifying the applicability of these statutes to the Postal Service.

Section 5(b) amends exemption (3) of the Freedom of Information Act, 5 U.S.C. § 552, to conform it to exemption (3) of the open meeting

provisions of this bill and to overrule the decision of the Supreme Court in *Administrator, FAA* v. *Robertson*, 422 U.S. 255 (1972).

Robertson held that exemption (3), which exempts from the coverage of the Freedom of Information Act any information "specifically exempted from disclosure by statute," includes within its ambit section 1104 of the Federal Aviation Act of 1958 (49 U.S.C. § 1504), which allows the FAA Administrator to withhold from the public any FAA material when he believes that "a disclosure of such information * * * is not required in the interest of the public."

Believing that the decision misconceives the intent of exemption (3), the committee recommends that the exemption be amended to exempt only material required to be withheld from the public by any statute establishing particular criteria or referring to particular types of information. The committee is of the opinion that this change would eliminate the gap created in the Freedom of Information Act by the *Robertson* case without in any way endangering statutes such as the Atomic Energy Act of 1954, 42 U.S C. §§ 2161–66, which provides explicitly for the protection of certain nuclear data.

Under the amendment, the provision of the Federal Aviation Act of 1958 that was the subject of *Robertson*, and which affords the FAA Administrator *cart blanche* to withhold any information he pleases, would not come within exemption 3. Similarly, the Trade Secrets Act, 18 U.S.C. § 1905, which relates only to the disclosure of information where disclosure is "not authorized by law," would not permit the withholding of information otherwise required to be disclosed by the Freedom of Information Act, since the disclosure is there authorized by law. Thus, for example, if material did not come within the broad trade secrets exemption contained in the Freedom of Information Act, section 1905 would not justify withholding; on the other hand, if material is within the trade secrets exemption of the Freedom of Information Act and therefore subject to disclosure if the agency determines that disclosure is in the public interest, section 1905 must be considered to ascertain whether the agency is forbidden from disclosing the information. *See Charles River Park "A", Inc.* v. *Dept. of Housing and Urban Development*, 519 F.2d 935, 941 n. 7 (D.C. Cir. 1975), and cases there cited.

Examples of statutes that could justify withholding under the amended exemption (3) includes sections 706(b) and 709(e) of the Civil Rights Act of 1964, as amended (42 U.S.C. §§ 2000e–5(b), 2000e–8(e)) and section 314(a)(3) of the Federal Election Campaign Act (2 U.S.C. S 437g(a)(3)), which require the Equal Employment Opportunity Commission and the Federal Election Commission, respectively, to withhold certain information relating to informal conciliation and enforcement efforts, and section 801 of the Federal Aviation Act of 1958 (49 U.S.C. § 1461), which prohibits the Civil Aeronautics Board from publishing certain information relating to a foreign air route application prior to its submission to the President for his decision on the route award.

Section 6

Section 6 provides that, with the exception of subsection (g) of the new 5 U.S.C. § 552b added by this act, the act shall take effect 180 days after the date of its enactment. Subsection (g), which requires the affected agencies to promulgate regulations within 180 days after it

takes effect, is to take effect upon enactment; this will assure that regulations have been promulgated by the time the substantive provisions of the open meeting portion of the bill come into force.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

TITLE 5, UNITED STATES CODE

* * * * * * *

CHAPTER 5—ADMINISTRATIVE PROCEDURE

SUBCHAPTER I—GENERAL PROVISIONS

SEC.
500. Administrative practice; general provisions.
501. Advertising practice; restrictions.
502. Administrative practice; Reserves and National Guardsmen.
503. Witness fees and allowances.

SUBCHAPTER II—ADMINISTRATIVE PROCEDURE

551. Definitions.
552. Public information; agency rules, opinions, orders, records and proceedings.
552a. Records about individuals.
552b. Open meetings.
553. Rule making.
554. Adjudications.
555. Ancillary matters.
556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision.
557. Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record.
558. Imposition of sanctions; determination of applications for licenses; suspension, revocation, and expiration of licenses.
559. Effect on other laws; effect of subsequent statute.

SUBCHAPTER III—ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

571. Purpose.
572. Definitions.
573. Administrative Conference of the United States.
574. Powers and duties of the Conference.
575. Organization of the Conference.
576. Appropriations.

* * * * * * *

SUBCHAPTER II—ADMINISTRATIVE PROCEDURE

§ 551. Definitions

For the purpose of this subchapter—

(1) * * *

* * * * * * *

(12) "agency proceedings" means an agency process as defined by paragraphs (5), (7), and (9) of this section; [and]

(13) "agency action" includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act[.] *; and*

(14) "ex parte communication" means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given.

* * * * * * *

§ 552. Public information; agency rules, opinions, orders, records, and proceedings

(a) * * *

* * * * * * *

(b) This section does not apply to matters that are—

(1) * * *

* * * * * * *

[(3) specifically exempted from disclosure by statute;]

(3) required to be withheld from the public by any statute establishing particular criteria or referring to particular types of information;

* * * * * * *

§ 552b. Open Meetings

(a) For purposes of this section—

(1) the term "agency" means the Federal Election Commission and any agency, as defined in section 552(e) of this title, headed by a collegial body composed of two or more individual members, a majority of whom are appointed to such position by the President with the advice and consent of the Senate, and includes any subdivision thereof authorized to act on behalf of the agency;

(2) the term "meeting" means the deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations concern the joint conduct or disposition of agency business; and

(3) the term "member" means an individual who belongs to a collegial body heading an agency.

(b) Except as provided in subsection (c), every portion of every meeting of an agency shall be open to public observation.

(c) Except in a case where the agency finds that the public interest requires otherwise, subsection (b) shall not apply to any portion of an agency meeting and the requirements of subsections (d) and (e) shall not apply to any information pertaining to such meeting otherwise required by this section to be disclosed to the public, where the agency properly determines that such portion or portions of its meeting or the disclosure of such information is likely to—

(1) disclose matters (A) specifically authorized under criteria established by an Executive order to be kept secret in the interests of national defense or foreign policy and (B) in fact properly classified pursuant to such Executive order;

(2) relate solely to the internal personnel rules and practices of an agency;

(3) disclose information required to be withheld from the public by any statute establishing particular criteria or referring to particular types of information;

(4) disclose trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) involve accusing any person of a crime, or formally censuring any person;

(6) disclose information of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy;

(7) disclose investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;

(8) disclose information contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions;

(9) disclose information the premature disclosure of which would—

(A) in the case of an agency which regulates currencies, securities, commodities, or financial institutions, be likely to (i) lead to significant financial speculation, or (ii) significantly endanger the stability of any financial institution; or

(B) in the case of any agency, be likely to significantly frustrate implementation of a proposed agency action, except that this subparagraph shall not apply in any instance where the content or nature of the proposed agency action already has been disclosed to the public by the agency, or where the agency is required by law to make such disclosure prior to taking final agency action on such proposal; or

(10) specifically concern the agency's issuance of a subpena, or the agency's participation in a civil action, an action in a foreign court or international tribunal, or an arbitration, or the initiation, conduct, or disposition by the agency of a particular case of formal agency adjudication pursuant to the procedures in section 554 of this title or otherwise involving a determination on the record after opportunity for a hearing.

(d)(1) Action under subsection (c) to close a portion or portions of an agency meeting shall be taken only when a majority of the entire membership of the agency votes to take such action. A separate vote of the agency members shall be taken with respect to each agency meeting a portion or portions of which are proposed to be closed to the public pursuant to subsection (c), or with respect to any information which is proposed to be withheld under subsection (c). A single vote

may be taken with respect to a series of portions of meetings which are proposed to be closed to the public, or with respect to any information concerning such series, so long as each portion of a meeting in such series involves the same particular matters, and is scheduled to be held no more than thity days after the initial portion of a meeting in such series. The vote of each agency member participating in such vote shall be recorded and no proxies shall be allowed.

(2) Whenever any person whose interests may be directly affected by a portion of a meeting requests that the agency close such portion to the public for any of the reasons referred to in paragraph (5), (6), or (7) of subsection (c), the agency, upon request of any one of its members, shall vote by recorded vote whether to close such meeting.

(3) Within one day of any vote taken pursuant to paragraph (1) or (2), the agency shall make publicly available a written copy of such vote reflecting the vote of each member on the question. If a portion of a meeting is to be closed to the public, the agency shall, within one day of the vote taken pursuant to paragraph (1) or (2) of this subsection, make publicly available a full written explanation of its action closing the portion together with a list of all persons expected to attend the meeting and their affiliation.

(4) Any agency, a majority of the portions of whose meetings may properly be closed to the public pursuant to paragraph (4), (8), (9)(A), or (10) of subsection (c), or any combination thereof, may provide by regulation for the closing of such portions in the event that a majority of the members of the agency votes by recorded vote at the beginning of such meeting, or portion thereof, to close the exempt portion or portions of the meeting, and a copy of such vote, reflecting the vote of each member on the question, is made available to the public. The provisions of paragraphs (1), (2), and (3) of this subsection and subsection (e) shall not apply to any portion of a meeting to which such regulations apply: Provided, That the agency shall, except to the extent that such information is exempt from disclosure under the provisions of subsection (c), provide the public with public announcement of the date, place, and subject matter of the meeting and each portion thereof at the earliest practicable time and in no case later than the commencement of the meeting or portion in question.

(e) In the case of each meeting, the agency shall make public announcement, at least one week before the meeting, of the date, place, and subject matter of the meeting, whether it is to be open or closed to the public, and the name and phone number of the official designated by the agency to respond to requests for information about the meeting. Such announcement shall be made unless a majority of the members of the agency determines by a recorded vote that agency business requires that such meeting be called at an earlier date, in which case the agency shall make public announcement of the date, place, and subject matter of such meeting, and whether open or closed to the public, at the earliest practicable time and in no case later than the commencement of the meeting or portion in question. The time, place, or subject matter of a meeting, or the determination of the agency to open or close a meeting, or portion of a meeting, to the public, may be changed following the public announcement required by this paragraph only if (1) a majority of the entire membership of the agency determines by a recorded vote that agency business so requires and that no earlier an-

nouncement of the change was possible, and (2) the agency publicly announces such change and the vote of each member upon such change at the earliest practicable time and in no case later than the commencement of the meeting or portion in question.

(f)(1) A complete transcript or electronic recording adequate to record fully the proceedings shall be made of each meeting, or portion of a meeting, closed to the public, except for a meeting, or portion of a meeting, closed to the public pursuant to paragraph (10) of subsection (c). The agency shall make promptly available to the public, in a location easily accessible to the public, the complete transcript or electronic recording of the discussion at such meeting of any item on the agenda, or of the testimony of any witness received at such meeting, except for such portion or portions of such discussion or testimony as the agency, by recorded vote taken subsequent to the meeting and promptly made available to the public, determines to contain information specified in paragraphs (1) through (10) of subsection (c). In place of each portion deleted from such a transcript or transcription the agency shall supply a written explanation of the reason for the deletion, and the portion of subsection (c) and any other statute said to permit the deletion. Copies of such transcript, or a transcription of such electronic recording disclosing the identity of each speaker, shall be furnished to any person at no greater than the actual cost of duplication or transcription or, if in the public interest, at no cost. The agency shall maintain a complete verbatim copy of the transcript, or a complete electronic recording of each meeting, or portion of a meeting, closed to the public, for a period of at least two years after such meeting, or until one year after the conclusion of any agency proceeding with respect to which the meeting, or a portion thereof, was held, whichever occurs later.

(2) Written minutes shall be made of any agency meeting, or portion thereof, which is open to the public. The agency shall make such minutes promptly available to the public in a location easily accessible to the public, and shall maintain such minutes for a period of at least two years after such meeting. Copies of such minutes shall be furnished to any person at no greater than the actual cost of duplication thereof or, if in the public interest, at no cost.

(g) Each agency subject to the requirements of this section shall, within 180 days after the date of enactment of this section, following consultation with the Office of the Chairman of the Administrative Conference of the United States and published notice in the Federal Register of at least thirty days and opportunity for written comment by any persons, promulgate regulations to implement the requirements of subsections (b) through (f) of this section. Any person may bring a proceeding in the United States District Court for the District of Columbia to require an agency to promulgate such regulations if such agency has not promulgated such regulations within the time period specified herein. Subject to any limitations of time therefor provided by law, any person may bring a proceeding in the United States Court of Appeals for the District of Columbia to set aside agency regulations issued pursuant to this subsection that are not in accord with the requirements of subsections (b) through (f) of this section, and to require the promulgation of regulations that are in accord with such subsections.

(h) The district courts of the United States have jurisdiction to enforce the requirements of subsections (b) through (f) of this section. Such actions may be brought by any person against an agency or its members prior to, or within sixty days after, the meeting out of which the violation of this section arises, except that if public announcement of such meeting is not initially provided by the agency in accordance with the requirements of this section, such action may be instituted pursuant to this section at any time prior to sixty days after any public announcement of such meeting. Such actions may be brought in the district wherein the plaintiff resides, or has his principal place of business, or where the agency in question has its headquarters. In such actions a defendant shall serve his answer within twenty days after the service of the complaint, but such time may be extended by the court for up to twenty additional days upon a showing of good cause therefor. The burden is on the defendant to sustain his action. In deciding such cases the court may examine in camera any portion of a transcript or electronic recording of a meeting closed to the public, and may take such additional evidence as it deems necessary. The court, having due regard for orderly administration and the public interest, as well as the interests of the party, may grant such equitable relief as it deems appropriate, including granting an injunction against future violations of this section, or ordering the agency to make available to the public such portion of the transcript or electronic recording of a meeting as is not authorized to be withheld under subsection (c) of this section. Except to the extent provided in subsection (i) of this section, nothing in this section confers jurisdiction on any district court acting solely under this subsection to set aside, enjoin or invalidate any agency action taken or discussed at an agency meeting out of which the violation of this section arose.

(i) Any Federal court otherwise authorized by law to review agency action may, at the application of any person properly participating in the judicial review proceeding, inquire into violations by the agency of the requirements of this section and afford any such relief as it deems appropriate.

(j) The court may assess against any party reasonable attorney fees and other litigation costs reasonably incurred by any other party who substantially prevails in any action brought in accordance with the provisions of subsection (g), (h), or (i) of this section, except that costs may be assessed against an individual member of an agency only in the case where the court finds such agency member has intentionally and repeatedly violated this section and against the plaintiff only where the court finds that the suit was initiated by the plaintiff primarily for frivolous or dilatory purposes. In the case of assessment of costs against an agency, the costs may be assessed by the court against the United States.

(k) Each agency subject to the requirements of this section shall annually report to Congress regarding its compliance with such requirements, including a tabulation of the total number of agency meetings open to the public, the total number of meetings closed to the public, the reasons for closing such meetings, and a description of any litigation brought against the agency under this section, including any costs assessed against the agency in such litigation (whether or not paid by the agency).

(l) Except as specifically provided in this section, nothing herein expands or limits the present rights of any person under section 552 of this title, except that the provisions of this Act shall govern in the case of any request made pursuant to such action to copy or inspect the transcripts or electronic recordings described in subsection (f) of this section. The requirements of chapter 33 of title 44, United States Code, shall not apply to the transcripts and electronic recordings described in subsection (f) of this section.

(m) This section does not constitute authority to withhold any information from Congress, and does not authorize the closing of any any agency meeting or portion thereof otherwise required by law to be open.

(n) Nothing in this section authorizes any agency to withhold from any individual any record, including transcripts or electronic recordings required by this Act, which is otherwise accessible to such individual under section 552a of this title.

(o) In the event that any meeting is subject to the provisions of the Federal Advisory Committee Act as well as the provisions of this section, the provisions of this section shall govern.

* * * * * * *

§ 556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision

(a) * * *

* * * * * * *

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. *The agency may, to the extent consistent with the interests of justice and the policy of the underlying statutes administered by the agency, consider a violation of section 557(d) of this title sufficient grounds for a decision adverse to a person or party who has committed such violation or caused such violation to occur.* A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

* * * * * * *

557. Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record

(a) * * *

(d)(1) In any agency proceeding which is subject to subsection (a) of this section, except to the extent required for the disposition of ex parte matters as authorized by law—

(A) no interested person outside the agency shall make or cause to be made to any member of the body comprising the agency, ad-

ministrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, an ex parte communication relative to the merits of the proceeding;

(B) no member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, shall make or cause to be made to any interested person outside the agency an ex parte communication relative to the merits of the proceeding;

(C) a member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of such proceeding who receives, or who makes or causes to be made, a communication prohibited by this subsection shall place on the public record of the proceeding:

(i) all such written communications;

(ii) memoranda stating the substance of all such oral communications; and

(iii) all written responses, and memoranda stating the substance of all oral responses, to the materials described in clauses (i) and (ii) of this subparagraph;

(D) in the event of a communication prohibited by this subsection and made or caused to be made by a party or interested person, the agency, administrative law judge, or other employee presiding at the hearing may, to the extent consistent with the interests of justice and the policy of the underlying statutes, require the person or party to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation; and

(E) the prohibitions of this subsection shall apply beginning at such time as the agency may designate, but in no case shall they begin to apply later than the time at which a proceeding is noticed for hearing unless the person responsible for the communication has knowledge that it will be noticed, in which case the prohibitions shall apply beginning at the time of his acquisition of such knowledge.

(2) This section does not constitute authority to withhold information from Congress.

* * * * * * *

SECTION 410 OF TITLE 39, UNITED STATES CODE

§ 410. Application of other laws

(a) Except as provided by subsection (b) of this section, and except as otherwise provided in this title or insofar as such laws remain in force as rules or regulations of the Postal Service, no Federal law dealing with public or Federal contracts, property, works, officers, employees, budgets, or funds, including the provisions of chapters 5 and 7 of title 5, shall apply to the exercise of the powers of the Postal Service.

(b) The following provisions shall apply to the Postal Service:

(1) Section 552 (public information), *section 552a* (*records about individuals*), *section 552b* (*open meetings*), section 3110 (restrictions on employment of relatives), section 3333 and chapters 71 (employee policies) and 73 (suitability, security, and conduct of employees), and section 5532 (dual pay) of title 5, except that no regulation issued under such chapters or sections shall apply to the Postal Service unless expressly made applicable;

* * * * * * *

ADDITIONAL VIEWS OF HON. FRANK HORTON (CONCURRED IN BY HON. JOHN N. ERLENBORN, HON. JOHN W. WYDLR, HON. CLARENCE J. BROWN, HON. SAM STEIGER, HON. GARRY BROWN, HON. EDWIN B. FORSYTHE, AND HON. WILLIS D. GRADISON, JR.)

Introduction

The undersigned subscribe wholeheartedly to the objectives of this legislation. The public's faith in the integrity of government rests on public understanding of the reasons for governmental decisions, and on the accountability of government officials for particularly those decisions which set legislative or administrative policies which impact on the nation as a whole. However, as recognized in the "Declaration of Policy" which begins on the first page of H.R. 11656, the public is not necessarily served by complete and unfettered disclosure of all government decisionmaking processes. The words "fullest practicable information" as used in the bill indicate the need for certain sensible limitations.

Our differences with the Committee bill are relatively few, but they afford an opportunity for highly significant improvements. Our principal concern is that the Congress which has enacted the two basic planks for federal information policies, the Freedom of Information Act and the Privacy Act, should adopt a sunshine bill which is consistent with the principles laid down in the two landmark bills we have already enacted. The Committee bill does not fully meet this standard since it erodes the clarity and firmness of the FOI Act exemptions, and threatens to erode the privacy protections we have erected for those involved in adjudications before collegial agencies.

We believe that a number of provisions of the Committee bill are inconsistent with the Declaration of Policy contained in the bill itself, and that these provisions would permit or mandate disclosures which would injure the rights of individuals and injure the ability of the Government to carry out its responsibilities.

We addressed our concerns with several specific provisions of H.R. 11656 in Committee, and we feel it is possible to amend the bill in a way that would let every bit as much sunshine behind the doors of government agency deliberations and provide a brand of sunshine which is less clouded by procedural red tape and confusion than that created by the Committee bill.

Our differences with H.R. 11656 are few but important. They include (1) the verbatim transcripts requirement for closed meetings, (2) the definition of "agency", (3) the definition of "meeting", (4) the identification of persons expected to attend a closed meeting, (5) the prescribed venue for actions brought under this legislation, (6) the personal liability of individual agency officials, and (7) the unfettered disclosure of all ex parte communications. These differences are summarized below.

Needed Improvements

(1) The Verbatim Transcript Requirement

The verbatim transcript requirement of H.R. 11656 could effectively destroy the provisions of the bill which permit certain meetings to be closed. While the provisions of the bill enable an agency to delete, by recorded vote at a subsequent meeting, sensitive portions of a transcript, they also require the agency to furnish the public what, in effect, are summaries of the deleted portions. In the case of agencies involved in the regulation of financial institutions, for example, harmful inferences drawn from the deletions could result in market speculation or damage to the stability of our financial markets and institutions.

The possibility of later disclosure of a verbatim transcript will inhibit free discussion about sensitive matters and thus impair the decisionmaking process in instances where candor is essential.

Moreover, the effect of the transcript requirement of the bill when coupled with relevant procedural requirements would lead to a situation bordering on the ridiculous.

The bill provides that votes to close meetings must be cast in person, no proxies being permitted. Thus a meeting must be held to vote on closing a subsequent meeting or meetings, and another meeting must be held to vote on any change in the time, place, or subject matter of a meeting already announced.

When these procedural requirements are coupled with the verbatim transcript or electronic recording requirements, the prospect is one of mind-boggling infinity. Thus, when a meeting is properly closed, the complete transcript or electronic recording of the proceedings must be made available to the public except for such portions determined by a recorded vote to fall within the exemptive provisions. In order to avoid the disclosure of such portions of the transcript, the meeting called to discuss, consider and vote on the proposed deletions must also be closed pursuant to the procedural requirements cited above. Since this meeting would be closed to consider information coming within the exemptive provisions of the bill, the complete transcript or electronic recording of such meeting must also be made available to the public except for those portions determined by a recorded vote to fall within the exemptive provisions. Again, in order to avoid the disclosure of such portions of the transcript of the second closed meeting, a third meeting called to consider and vote on the proposed deletions stemming from the second meeting must be closed, and the transcript of that meeting must be examined at a fourth closed meeting and so on and on ad infinitum. Obviously, some rule of reason must prevail in the implementation of such a provision, but the letter of the law, if observed, would be paralytic in its effect.

We do not subscribe to the position that the transcript requirement is essential to the enforceability of the act and we feel that a reasonable compromise can be worked out in this area. The discovery procedures available to U.S. District Courts do not depend upon the availability of verbatim transcripts or electronic recordings of agency meetings. While the concepts embodied in H.R. 11656 stem from "Sunshine" or "open meeting" statutes of the States, none of the 49 State

80-459 O - 77 - 36

statutes, so far as we can determine, has a verbatim transcript requirement for either open or closed meetings.

(2) *The Definition of "Agency"*

The definition of "agency" contained in H.R. 11656 is unclear and would lead to unnecessary confusion and litigation.

The agencies to be covered can and should be specifically listed. A successful precedent for this approach is the Government Corporation Control Act of 1945, 31 USC 841 et seq. This Act has been amended on several occasions to add or delete particular corporations. This procedure would be appropriate for H.R. 11656. Congress can, of course, always amend the Act to add or delete agencies but would be required to review the applicability of the Act on the infrequent occasions when such an agency is created.

(3) *The Definition of "Meeting"*

Meetings covered by the bill should be those gatherings for the purpose of conducting official agency business of at least the number of individual agency members required to take final action on behalf of the agency. The meeting definition in H.R. 11656 would apply even to casual or social encounters which were not gatherings for the purpose of acting in behalf of the agency.

(4) *Identification of Persons Attending Closed Meetings—*

The requirement of H.R. 11656 that an agency publicly list all persons expected to attend a closed meeting and their affiliations would permit inferences not in the public interest to be drawn from such information. Particularly in adjudicatory proceedings falling under one of the 10 exemptions from the open meetings requirement, premature disclosure of the names of individuals or organizations, concerning or against whom official action may or may not be taken, could lead to damaging speculation or premature public reaction that could result in damage to individual rights, to financial markets or to other interests that should legitimately be protected by government regulators.

(5) *Venue For Actions Brought Under the Legislation*

We feel that venue for actions brought under the legislation should be limited to the district in which the agency in question has its headquarters or where the meeting in question occurred. H.R. 11656 permits such actions to be brought also where the plaintiff resides or has his principal place of business. This could lead to duplicative lawsuits spread across the country covering the same agency meeting or meetings.

(6) *Personal Liability of Individuals*

We question the provisions of H.R. 11656 imposing personal liability on individual agency members for attorney's fees and court costs. The assessment of attorney fees and other litigation costs personally against individual members of an agency can only lead to a further diminution of the rewards of public service. This provision would not only discourage qualified persons from accepting agency appointments, but would inhibit performance of official duties by those in office.

(7) *Ex Parte Communications*

H.R. 11656 would place in the public record all documentation of prohibited ex parte communications even those dealing with matters which, if the subject of an agency meeting, would permit the closing of such meeting, or, if the subject of a request for documents under the Freedom of Information Act, would be exempt from disclosure under one of the Act's exemptions. We fully support the prohibition of ex parte contacts, but feel this provision could be abused to force disclosure of otherwise exempt information.

Cost

It is not possible to estimate the the costs of complying with the provisions of H.R. 11656. Certainly the time of a majority of the entire membership of an agency spent in the repeated voting sessions attendant upon closed meetings; the time spent by lawyers and other staff members examining documents; litigation costs arising from actions created by the bill; the administrative burden of preparing a verbatim transcript of each closed meeting, of deleting exempt portions and of providing a copy of the remainder to the public will be significant.

Summary

In summary, we support the purposes of H.R. 11656, but we feel the bill should be improved to avoid disclosures not in the public interest, invasions of privacy, excessive costs, and the disruptions and delays of agency proceedings that are bound to result from the enactment of H.R. 11656 in its present form.

We concur in the foregoing views:

Frank Horton.
John N. Erlenborn.
John W. Wydler.
Clarence J. Brown.
Sam Steiger.
Garry Brown.
Edwin B. Forsythe.
Willis D. Gradison, Jr.

ADDITIONAL VIEWS OF HON. CLARENCE J. BROWN

I concur fully with the views expressed by my colleague, Congressman Horton.

While I strongly support the policy of open meetings as vital to maintaining and enhancing the integrity of the governmental process, I feel that H.R. 11656 fails to make what I believe is a necessary distinction between the rule-making (quasi-legislative) and the adjudicatory (quasi-judicial, quasi-administrative) functions of the agencies covered by this legislation.

Meetings of an agency at which decisions of applicability to the general public are made are quasi-legislative, and therefore should most definitely be open to the public. On the other hand, those meetings at which decisions are made that affect only the status of the parties involved are quasi-adjudicatory in nature, and should in appropriate cases be permitted to remain private until a final decision is reached in order to protect to the fullest extent possible the rights of the individuals or parties involved.

It makes bad law for us not to draw these distinctions, and emphasizes the contradiction in current Congressional passions for the public's right to know, and the individual's right to privacy. The schizoid nature of Congressional attitude in these areas needs to be clarified. Rather than clarifying, this legislation only serves to blur them further.

CLARENCE J. BROWN.

ADDITIONAL VIEWS OF HON. PAUL N. McCLOSKEY, JR., HON. JOHN N. ERLENBORN, HON. GARRY BROWN, HON. CHARLES THONE, HON. EDWIN B. FORSYTHE, HON. ROBERT W. KASTEN, JR., AND HON. WILLIS D. GRADISON, JR.

This "Sunshine" bill has a laudable purpose. As written, however, the bill imposes incredible new burdens on the day-to-day operations of government.

H.R. 11656 received very little testimony before the House Subcommittee on Government Information and Individual Rights (B. Abzug, Chairperson), partly because it was originally taken almost verbatim from S. 5, passed by the Senate by a vote of 94 to 0.

Whenever the Senate acts unanimously, it behooves us to examine their work carefully to determine whether such unusual agreement betokens careful craftsmanship or uncommon inattention. In this instance, we believe the latter description applies.

All of us desire that the affairs of government be conducted as openly as possible "in the sunshine," as it were.

Likewise, however, all of us have agreed of late that we should try to cut the cost of government, and, in particular, that we should try to cut the need for mountains of paperwork.

Similarly, we believe we are beginning to perceive a need to discourage undue litigation in the court system. Our federal judges are already underpaid and overworked.

Balancing these three goals, (1) open government (2) cutting costs of government and (3) discouraging undue litigation, how does the "Sunshine" bill, H.R. 11656, measure up?

First of all, it is a lawyer's dream. Imagine the right to bring a lawsuit and be guaranteed attorney's fees and costs merely if you "substantially prevail?" (Page 12, line 20 et seq.)

Further, note that as a plaintiff, not only can you obtain personal costs against individual agency members in certain cases (pages 12–13), but that costs cannot be assessed against you, even if you lose, at least not unless you are found to have initiated the lawsuit "primarily for frivolous or dilatory purposes" (page 13, lines 2–4). Further, note with pleasure that the burden of proof is always on the government!

Finally, note that one can bring such a lawsuit against any agency covered in the Act in the plaintiff's own home district, regardless of where the meeting is held. (Page 11, lines 16–18.)

What a bonanza for the legal profession?

Assume, for example, that the SEC wishes to hold a closed meeting in Washington on the question of whether to order a cessation in trading of Lockheed shares on the stock market.

Any shareholder or citizen residing in any one of the 50 states could bring a lawsuit in his home district to contest the closing of the meeting. The SEC would be required to answer an ordinary complaint in

20 days, or within 40 days if it could show good cause, but this is a simple responsibility compared to the SEC's problem if a few Lockheed shareholders in different states should elect to sue to enjoin the SEC from closing its meeting.

Consider the legal cost to a Washington-based agency in defending against a temporary restraining order, in Alaska on Friday, Hawaii on Monday and Idaho on Tuesday!

The legal burden imposed on a single agency by the unique combination of legal rights and duties contained in H.R. 11656 could constitute an unconscionable burden on the public treasury, as well as practically paralyze the Justice Department and the legal staff of the agency involved.

At least 38 agencies are covered by this bill, and each one of them is subject to an easily-brought lawsuit every time a meeting is closed under one of ten permitted exemptions.

Also, the exemptions are by no means clear cut. Take exemption (6) for example (page 4, lines 1–3), permitting closure when a meeting is likely to: "disclose information of a personal nature were disclosure would constitute a clearly unwarranted invasion of personal privacy."

This kind of language permits a bona fide court test of almost any privacy contention an agency might determine as the basis for closing a meeting.

Do we really want to subject all agencies of the federal government "headed by a collegial body composed of two or more individual members, a majority of whom are appointed to such position by the President" (page 2, lines 10–14), to such risk of litigation?

It is true that a majority of the Members of the House are lawyers. It is likewise true that many of us anticipate returning to the practice of law at some future date. (Some of us sooner than others if the impact and costs of this bill are ever understood by the organized Bar and the public.) But do we really need to create such a new and profitable field of employment for our own profession?

We have to confess to a certain feeling of inadequacy at having failed initially to perceive the serious problems with the bill, or to persuade our colleagues on the Government Operations Committee of the need for its substantial amendment.

We have not mentioned in these views the cumbersome nature of the notice and verbatim transcript provisions of the bill mentioned in the views of our colleague, Frank Horton, but their possible costs could also be monumental. In our haste to pass the bill, we think the least the Committee could have done was to wait for testimony by the Administration on its potential budgetary impact.

Unfortunately, the Committee received no testimony whatsoever on the magnitude of potential costs, either legal or administrative.

Upon reflection, it seems to us that the cumulative effects of the pernicious provisions of H.R. 11656 outweigh the bill's usefulness. Unless the Horton substitute can be adopted, we are impelled to conclude that the bill should be recommitted for more careful draftsmanship.

PAUL N. MCCLOSKEY, JR.,
JOHN N. ERLENBORN,
GARRY BROWN,
CHARLES THONE,
EDWIN B. FORSYTHE,
ROBERT W. KASTEN, JR.,
WILLIS D. GRADISON, JR.

94TH CONGRESS 2d Session } HOUSE OF REPRESENTATIVES { REPT. 94–880 Part 2

GOVERNMENT IN THE SUNSHINE ACT

APRIL 8, 1976.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. FLOWERS, from the Committee on the Judiciary, submitted the following

REPORT

together with

ADDITIONAL AND SUPPLEMENTAL VIEWS

[To accompany H.R. 11656]

The Committee on the Judiciary, to whom was referred the bill (H.R. 11656) to provide that meetings of Government agencies shall be open to the public, and for other purposes, having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

The amendments are as follows:

Page 2, lines 19, 20, 21, 22 and 23: Strike "the term 'meeting' means the deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations concern the joint conduct or disposition of agency business; and" and insert: "the term 'meeting' means an assembly or simultaneous communication concerning the joint conduct or disposition of agency business by two or more, but at least the number of individual agency members required to take action on behalf of the agency, but does not include meetings required or permitted by subsection (d); and".

Page 3, line 1: Strike "(b):" and insert:

"(b) (1) Members as described in subsection (a) (2) shall not jointly conduct or dispose of agency business without complying with subsections (b) through (g).

(2)".

Page 3, line 19: After "required" insert "or permitted".

Page 4, line 7: After "purposes", insert "or information which if written would be contained in such records,".

Page 4, line 8: After "records" insert "or information".

Page 5, line 11: Strike "where" and insert "after".

Page 5, line 12: Strike "already".

Page 5, line 13: Strike "or where" and insert "unless".

Page 5, line 15: Strike "proposal;" and insert "proposal, or after the agency publishes or serves a substantive rule pursuant to section 553 (d) of this title;".

Page 5, line 19: After "action" insert "or proceeding".

Page 6, lines 7, 8, and 9: Strike ", or with respect to any information which is proposed to be withheld under subsection (c)".

Page 7, line 9: Strike "of the portions".

Page 7, line 13: Strike "portions" and insert "meetings or portions thereof".

Page 9, lines 13, 14 and 15: Strike ", by recorded vote taken subsequent to the meeting and promptly made available to the public,".

Page 9, lines 17 through 20: Strike "In place of each portion deleted from such a transcript or transcription the agency shall supply a written explanation of the reason for the deletion and the portion of subsection (c) and any other statute said to permit the deletion."

Page 11, line 13: Strike "or its members".

Page 11, lines 21 and 22: Strike "wherein the plaintiff resides, or has his principal place of business" and insert "court of the United States for the district in which the agency meeting is held, or in the District Court for the District of Columbia".

Page 12, lines 13 and 14: Strike "Except to the extent provided in subsection (i) of this section, nothing" and insert "Nothing".

Page 12, lines 19 through 23: Strike "(i) Any Federal court otherwise authorized by law to review agency action may, at the application of any person properly participating in the judicial review proceedings, inquire into violations by the agency of the requirements of this section and afford any such relief as it deems appropriate.

Page 12, line 24: Strike "(j)" and insert "(i)".

Page 13, lines 2 and 3: Strike "(g), (h), or (i)" and insert "(g) or (h)".

Page 13, lines 4, 5, and 6: Strike "against an individual member of an agency only in the case where the court finds such agency member has intentionally and repeatedly violated this section and".

Page 13, line 11: Strike "(k)" and insert "(j)".

Page 13, line 20: Strike "(l)" and insert "(k)".

Page 14, line 5: Strike "(m)" and insert "(l)".

Page 14, line 9: Strike "(n)" and insert "(m)".

Page 14, line 14: Strike "(o)" and insert "(n)".

Page 18, line 8: After "required" insert "or permitted".

Purpose

The purpose of the proposed legislation is to amend the Administrative Procedure Act provisions of title 5, United States Code, to provide, subject to the exceptions in the bill, that all meetings of agencies headed by a collegial body of two or more members shall be open to public observation. The new section added to title 5 would provide for procedures and court jurisdiction to implement this purpose. In addition, the bill would add language to existing provisions of the Administrative Procedure Act to bar ex parte communications in connection with adjudication and formal rule making under the provisions of that Act now codified as a part of title 5.

Explanation of Committee Amendments

Page 2, lines 19 through 23
(Definition of "meeting")

This amendment would change the definition of "meeting" in § 552b (a) (2) to read: "the term 'meeting' means an assembly or simultaneous communication concerning the joint conduct or disposition of agency business by two or more, but at least the number of individual agency members required to take action on behalf of the agency, but does not include meetings required or permitted by subsection (d); and".

New section 552b requires advance notice of the date and place of meetings, their subject matter, and whether it will be open or closed to the public. The revised language of the definition of "meeting" makes it possible to identify the meeting and its purpose to satisfy this requirement of advance notice. It makes it clear that there must be at least two members at the meeting, with an additional requirement that there also be at least the number of individual agency members required to take action on behalf of the agency. It also adds the clarification that the term includes any joint communication such as a conference telephone call. This definition must be read in relation to the amendment made to subsection (b) which provides that the agency members referred to in this subparagraph cannot jointly conduct or dispose of agency business other than as provided in the section—that is, in an open meeting or, where authorized, a closed meeting governed by the same definition. This amendment includes the words "but does not include meetings required or permitted by subsection (d)". This would except from "meetings" covered by the new section those meetings required to decide matters covered by subsection (d) which are procedural in nature and concern decisions and voting on closing meetings and on announcing meetings. However, such meetings could not include the conduct or disposition of agency business.

Page 3, line 1

(Prohibition Against Evasion of Provisions of New Section 552b as to Conduct or Disposition of Agency Business)

The new language added as new subparagraph (b) (1) of section 552b would bar the conduct or disposition of agency business other than as provided in subsections (b) through (g) of new section 552b. This gives an express standard for compliance. On challenge, a court will be in a better position to determine whether the agency has complied. This provision will bar any effort of the number of members necessary for agency action to deliberate, discuss, conduct, or dispose of agency business other than in an open meeting as provided in new section 552b or in a closed portion authorized by the exceptions in that section.

Page 3, line 19

(Statutes requiring or permitting withholding of particular information)

The amendment adds the words "or permitted" to the existing language of exception (3) of subsection (c) providing an exception for

withholding of information directed by statute. Many statutes permit the withholding of information but since they allow judgment or discretion in withholding information, the bill would not have originally included such statutes within the exception. The amendment is consistent with the language and purpose of those statutes which assume that such information can be withheld when the information has been determined to fit the criteria or particular identification of the statute concerned.

Page 4, line 7

(Clarification as to Non-record Information)

The exceptions in the bill were patterned after the Freedom of Information Act (5 U.S.C. 552), an Act which concerns written records. This bill concerns the right of members of the public to observe agency meetings at which information will be given in oral discussions. This amendment clarified the fact that the exception also applies to information given orally by adding to "records" the phrase "or information which if written would be contained in such records".

Page 5, lines 11 and 12

(To Clarify When the Exception as to Premature Disclosure of Agency Will *Not* be Available)

The substitution of the word "after" for "where" is to clarify that the exception as to a frustration of agency action will be unavailable after the content or nature of the action has been disclosed. The word "already" is deleted as unnecessary.

Page 5, line 13

(Inserting the Word "Unless" to Qualify the Previous Bar to the Use of the Exception in Cases Where Disclosure is to be Made Prior to Final Agency Action)

The word "unless" is substituted for "or where" to make a further qualification concerning required statutory disclosure prior to final action.

Page 5, line 15

(Reference to Public Notice of Rule Making Under Section 553 of title 5)

The addition of the language relating to rule making makes it clear that the exception does not apply after notice of rule making has been given under section 553.

Page 5, line 19

(Legal "Proceedings")

The addition of the word "proceeding" is added so that it will be included along with a civil action.

Page 7, line 9, and line 13

(Clarification of Meetings Subject to Exception)

The words "of the portions" were deleted because of the difficulty of determining how "a majority of the portions" of agency meetings could be determined. While a "portion" could be all or a part of a meeting, the term is unclear for the purpose of determining a majority as provided in the subparagraph. This amendment will make such a determination possible.

Page 9, lines 13, 14 and 15 and Page 6, lines 7, 8 and 9

(Striking the Requirement for Agency Vote on Each Transcript Deletion)

The amendment on page 9 is to strike the words ", by recorded vote taken subsequent to the meeting and promptly made available to the public,". This would preserve the right of the public to access to a transcript or recording of any closed meeting with only those portions deleted that are subject to the exceptions in section 552b. However, it would relieve the agency members from the detailed and procedurally difficult operation of going over the transcripts or recordings and voting on deletions. The amendment on page 6, lines 7, 8 and 9 deletes the words ", or with respect to any information which is proposed to be withheld under subsection (c)", and this is a conforming amendment to the one described above.

Page 9, lines 17, 18, 19 and 20

(Striking the Requirement for a Written Explanation of Each Deletion)

The amendment deletes the requirement of a written explanation of each deletion from the transcript by striking the words "In place of each portion deleted from such a transcript or transcription the agency shall supply a written explanation of the reason for the deletion, and the portion of subsection (c) and any other statute said to permit the deletion." Of course, the complete transcript or recording must be made and kept as provided in the section to be available in the event of any court challenge as provided in subsection (h).

Page 11, line 13

(Deletion of "or its members")

The language of subsection (h) authorizes an action against the agency so that it would not be necessary to join individual members to gain court jurisdiction. The amendment also removes the objection that the provision would have the effect of subjecting individual agency members to suit for official acts and possibly being assessed costs and attorneys fees. The amendment also conforms to the amendment on page 13 deleting the references to members in reference to the assessment of costs.

Page 11, lines 20 and 22

(Changing Venue Requirements to Require Challenges Based on Section 552b to be Brought in the District in Which the Agency Meeting is Held or in the District of Columbia or in the District in Which the Agency Has its Headquarters)

This amendment substitutes the words "court of the United States for the district in which the agency meeting is held, or in the District Court for the District of Columbia" for the words "wherein the plaintiff resides, or has his principal place of business." It should be emphasized that the language of the section conferring jurisdiction in the district courts to enforce requirements of the section and permitting "any person" to bring the action are retained. These actions would concern meetings of the agency and matters relating to those meetings. It is therefore logical that the actions be brought in districts in which those meetings are or have been held. The amended venue provisions are, therefore, appropriate in view of the purpose of the new section and of court enforcement of its specific provisions concerning the conduct of the meetings.

Page 12, lines 13 and 14 and
lines 19 through 23; and
Page 13, lines 2 and 3

(Striking Subsection (i) referring to Review of Agency Actions)

While subsection (h) of section 552b provides that any court, acting under the jurisdiction provided therein to enforce the requirement of subsections (b) through (g) of the section cannot set aside, enjoin or invalidate any agency action by reason of the violation concerned, subsection (i) would permit such invalidation incident to a review on the merits. The amendment strikes subparagraph (i) from the section. Section 706 of title 5 is the section of the Administrative Procedure Act concerning the scope of judicial review and details the basis for invalidation of agency action. Included therein is item (2) (D) which provides that a reviewing court shall hold unlawful and set aside agency action, findings, and conclusions found to be "without observance of procedure required by law". Adequate authority is therefore provided by law to inquire into matters governed by the new section in the event of such subsequent judicial review. The exception in subsection (h) in lines 13 and 14 of page 12 referring to subsection (i) is also deleted as a conforming amendment as is the reference to subsection (i) in original subsection (j) which would then be re-lettered.

Page 12, line 24; Page 13, lines 11 and 20;
Page 14, lines 5, 9 and 14

These are conforming amendments to change subsection designations as the result of the deletion of subsection (i).

Page 12, lines 19 through 23

(Deletion of Provision Concerning Assessment of Attorneys Fees and Costs Against Individual Agency Members)

The provision is deleted because it was concluded that it is not desirable or even possible to assess costs against individual members for actions taken by a collegial body based upon the participation by those agency members in agency action.

Page 18, line 8

(Amendment to Information Permitted to be Withheld Conforming Amendment to that Added to 552b(c) (3) on page 3)

As introduced, the bill would have also amended the Freedom of Information Act provisions of § 552(b) (3) to limit the exception for information covered by statutes to only information covered by statutes which require that information of a particular type or criteria be withheld. This would not provide an exception for statutes which permit the agency to determine whether such information should be released or not. The amendment was made because the language is unduly restrictive.[1] (For example, the section concerning release of atomic energy information permits a continuous review of restricted data to permit declassification where information may be declassified "without undue risk to the common defense and security." 42 U.S.C. 2162)

Outline of Provisions of the Bill

Section 1 of the bill provides that the Act is to be cited as the "Government in the Sunshine Act".

Section 2 of the bill states that the bill is intended to provide the public with the fullest practicable information as to Governmental decisionmaking processes.

Section 3(a) of the bill adds a new Section 552b to title 5 and provides for open meetings by the agencies defined in the section.

Subsection (a) provides for definitions in addition to those applicable to the Administrative Procedure Act provisions of title 5. The term "agency" is to include Government authorities as defined in the Administrative Procedure Act provisions of section 551 and the Freedom of Information Act provisions of Section 552(e) with the further qualification that it is to be an agency headed by a "collegial" body of two or more members "a majority of whom are appointed to such position by the president with the advice and consent of the Senate".

The bill, as referred to the Committee on the Judiciary, would have defined "meeting" as the deliberations of the agency members required to take action concerning the joint conduct or disposition of agency business. The Judiciary Committee amendment is to strike

[1] Note the discussion concerning similar language and on identical amendment to the language of exception (3) of subsection (c) of new section 552b in the explanations of committee amendments and in the general statement of the committee in this report.

the previous definition of meeting and provide that the term "meeting" means an assembly or simultaneous communication concerning the joint conduct or disposition of agency business by two or more, but at least the number of individual agency members required to take action on behalf of the agency. The definition includes an exception that the term "meeting" will not include meetings required or permitted by subsection (d) of new Section 552b. Subsection (d) of the amended bill concerns the closing of agency meetings and the manner in which those meetings can be closed by votes of the agency.

A "member" means an individual who belongs to the collegial body heading an agency.

Subsection (b) of the bill as amended by the Judiciary Committee refers in subparagraph (b) (1) to "members", as described in Section (a) (2), as two or more members of an agency, but at least the number of agency members required to take action on behalf of the agency. This subparagraph provides that the members so described shall not jointly conduct or dispose of agency business without complying with subsections (b) through (g) of this section, which contain the requirements for meetings covered by the section. Subparagraph (b) (2) contains the language of original section (b) and states the basic requirement of the bill that every portion of every meeting of an agency is to be open to public observation unless falling within the exceptions of subsection (a).

Subsection (c) provides ten exceptions which authorize an agency to close "any portion of any agency meeting". These exceptions would permit closed meetings to prevent the disclosure of the following:

1. Matters authorized under executive order criteria to be kept secret in the interest of national defense or foreign policy.

2. Matters which relate solely to the internal personnel rules and practices of an agency.

3. Information required or permitted to be withheld from the public by any statute. The Judiciary Committee amendment to this provision was to insert the term "or permitted" to provide for an application to information covered by statutes requiring a degree of judgment or discretion in the release of information.

4. Privileged or confidential trade secrets and commercial or financial information obtained from a person.

5. Matters involving the criminal accusation of commission of a crime or formal censure of any person.

6. Information of a personal nature constituting an unwarranted personal invasion of privacy.

7. Investigatory records or information which if written would be contained in such records compiled for law enforcement purposes but with specific limitations where disclosure would:

(A) interfere with enforcement proceedings,

(B) deprive a person of a fair trial or an impartial adjudication.

(C) constitute an unwarranted invasion of personal privacy.

(D) disclose the identity of a confidential source and—as to records or information compiled in a criminal investigation by a criminal law enforcement authority, or as to records or information compiled by an agency in a lawful security intelligence in-

vestigation—confidential information furnished only by the confidential source,

(E) disclose investigative techniques and procedures,

(F) endanger the life or physical safety of law enforcement personnel.

8. Information by or for an agency responsible for the regulation or supervision of financial institutions concerning examination, operation or condition reports of those institutions.

9. Information where premature disclosure would—

(A) for agencies involved in the regulation of currencies, securities, commodities, or financial institutions which would either lead to significant financial speculation or to significantly endanger the stability of any financial institution, or

(B) be likely to significantly frustrate the implementation of a proposed agency action.

This exception would not be available after the content or nature of the proposed action has been disclosed to the public by the agency or unless the agency, as required by law, makes such disclosure prior to taking final agency action on the proposal. It is further provided in the amended bill that the exception will not be available after the agency publishes or serves a substantive rule pursuant to Section 553(d) of this title.

10. Concern matters relating to litigation, including those concerning the agency's issuance of a subpoena, participation in a civil action or proceeding, or action in a foreign court or international tribunal. The exception would also apply to matters concerning arbitration, formal agency adjudication or determinations on the record after opportunity for a hearing (formal rule making).

Subsection (d)(1) of the amended bill details the procedures to be followed in closing a portion or portions of a meeting. A separate recorded vote of agency members is required in each proposal to close a meeting. A "series of portions of meetings" for a period of 30 days involving the "same particular matters" can be closed by a single vote. Subsection (d)(2) provides that a person affected may make a request for closure based on the exceptions related to (5) accusation of a crime, (6) information of a personal nature or (7) investigatory records. Within one day of a vote to close, the written copy of the vote reflecting the vote of each member is to be made public and if a portion of a meeting is to be closed, there must be a full written explanation of the action of all persons who will attend and their affiliation. When a majority of an agency's meetings may be closed under exceptions relating to (4) trade secrets and financial information, (8) financial institution regulations, (9) premature disclosures concerning financial speculation, stability of financial institutions or frustration of agency action, or (10) matters relating to litigation, arbitration, formal agency adjudication or determinations on the record, the agency may provide by regulation for the closing of such portions of meetings. However, a majority of the members of the agency must still vote by recorded vote at the beginning of each meeting or portion thereof to close the exempt portion. The agency will also be required to provide the public with an announcement of the date, place and subject matter of the meeting and

"each portion thereof" at the earliest practicable time prior to the meeting.

Subparagraph (e) provides for the public announcement, at least one week before a meeting, of the date, place, subject matter and whether it is open or closed, but by recorded vote, a majority of the members may provide for an earlier meeting date, in which case the announcement must be made prior to the commencement of the meeting.

Subparagraph (f)(1) of the amended bill requires that there be a complete transcript or electronic recording of all meetings or portions of meetings closed to the public. The only exception is for meetings or portions closed relative to Exception 10 concerning litigation, arbitration, formal adjudication or formal rule making. A revised version of the transcript or recording, with the portions deleted which are covered by the exceptions of subsection (c), is to be made available to the public. The complete transcript or recording must be maintained for two years or for one year following disposition of the matter. Subparagraph (f)(2) provides that written minutes of open agency meetings shall be made public, and maintained for at least two years.

Subparagraph (g) requires promulgation of regulations to implement the requirements of the section. Notice and written comment are required. Any person can bring an action in the U.S. Court of Appeals for the District of Columbia to require promulgation or to challenge the regulations, and similarly any person can bring a proceeding in the United States Court of Appeals for the District of Columbia to set aside agency regulations not satisfying subsections (b) through (f) and to require new regulations that do so.

Subparagraph (h) of the amended bill confers jurisdiction on the district courts to enforce the requirements of the section and authorizes actions by any person which may be brought in the court of the United States for the district in which the agency meeting is held or in the District Court for the District of Columbia or where the agency has its headquarters. The Government has the burden to sustain its actions and the court will have access to any transcript or recording and may grant appropriate equitable relief. Nothing in the section may be taken as the sole basis for invalidating the agency action involved in the meeting which is the subject of the litigation.

Subparagraph (i) of the amended bill was previously subsection (j) and the designation was changed because the bill was amended to strike (i), as explained in the discussion of the committee amendments. The redesignated paragraph provides for attorneys fees and litigation costs for "any other party" who substantially prevails in an action. This can include assessment of costs against the United State. The Committee on the Judiciary struck language which would have permitted the assessment of costs against individual agency members. They may also be assessed against plaintiffs where the court finds that the primary motive was for frivolous or dilatory purposes.

Subparagraph (j) of the amended bill [relettered] provides for an annual report to Congress involving matters covered by the section.

Subparagraph (k) of the amended bill [relettered] relates to the Freedom of Information Act and in effect says that nothing in the section is to be interpreted as expending or limiting the rights of any

person under Section 552 except as specifically provided as to transcripts and recordings.

Subparagraph (l) of the amended bill [relettered] provides that the section is not to be construed as limiting information to Congress and does not authorize the closing of meetings required to be open by law.

Subparagraph (m) of the amended bill [relettered] preserves the rights of individuals to any record accessible under the Freedom of Information Act provisions of section 552(a).

Subparagraph (n) of the amended bill [relettered] provides that the section is to govern in the event of a meeting also subject to the Federal Advisory Committee Act.

Section 3(b) of the bill amends the chapter analysis of chapter 5 of title 5 by adding the catch line of new section 552b as follows:

"552b. Open meetings."

Section 4(a) of the bill adds a new subsection (d)(1) to section 557 of title 5, United States Code, concerning ex parte communications in relation to adjudication and formal rule making under the Administrative Procedure Act. Section 557 concerns decisions based on the record of hearings conducted in accordance with section 556. The new subsection (d) added by this bill would provide express limitations and procedures relating to ex parte communications relative to the merits of agency proceedings. The bar would apply to ex parte communications relative to the merits of such proceeding by interested persons outside the agency made to agency personnel involved or expected to be involved in the decisional process. Similarly, no such agency official could make an ex parte communication to an interested party outside the agency. The incorporation of the new subsection in Section 557 results in the provisions being made applicable to adjudications and to formal rule making. The language of the bill provides for communications or memoranda of oral communications to be made a part of the public record of the proceedings along with written responses and memoranda of oral responses. In the event there is such an ex parte communication, the agency, administrative law judge or presiding employee may require a party to show cause why his claim or interest in the proceeding should not be denied, dismissed or disregarded or otherwise be acted upon adversely.

Section 4(b) amends Section 551, the definitions section of the Administrative Procedure Act, to include an item (14) a definition of "ex parte communication". This term is defined as "an oral or written communication entered on the public record with respect to which reasonable prior notice to all parties is not given."

Section 4(c) amends Section 556(d) of title 5 which is the section concerning hearings, presiding employees, powers and duties, burden of proof, evidence and record as to basis of decision by the addition of a sentence referring to ex parte communications. The amendment is to add that "The agency may, to the extent consistent with the interests of justice and the policy of the underlying statutes administered by the agency, consider a violation of section 557(d) of this title sufficient grounds for a decision adverse to a person or party who has committed such violation or caused such violation to occur.

Section 5 of the bill provides for conforming amendments. Subsection (a) amends Section 410(b)(1) of title 39 (Postal Service) U.S.

80-459 O - 77 - 37

Code to include in the subparagraph the words "Section 552(a) (records about individuals), Section 552(b) (open meetings),".

Subsection 5(b) of the amended bill amends Section 552(b)(3) of title 5, the subparagraph which relates to matters specifically exempted from disclosure by statute. As amended, subparagraph (3) would read: "Required *or permitted* to be withheld from the public by any statute establishing particular criteria or referring to particular types of information."

Section 6 of the bill provides that the bill is to take effect 180 days after the date of enactment, except that subsection (g) of Section 552b, added to title 5 by the bill, is to take effect upon enactment. Subsection (g) is the subsection which concerns the promulgation of implementing regulations.

Openness of Committee Meetings

The basic purpose of this bill is expressed in subsection (b) [amended as (b)(2)] of new section 552b where it is provided that meetings of agencies covered by the section are to be open to public observation unless the information being discussed falls within an exception in subsection (c). Our system of Government assumes that citizens have the right to know how their government operates and what the government is doing for them and in their name. Public participation and awareness will be promoted by increasing openness in Government and this should lead to improved decision-making and greater accountability on the part of the Government. At the same time, an understanding of Government operation and action will promote public confidence in the Government.

The subjects dealt with in this bill have been extensively considered both in the Senate and in the House. The provisions of the bill as referred to the Committee on the Judiciary has already been discussed at length in Part I of this report based upon the consideration of the bill before the House Committee on Government Operations (H. Rept. 94–880, 94th Cong. 2d Sess., Part I). A similar discussion as to provisions embodied in the Senate companion bill, S. 5, was the subject of the report of the Senate Committee on Government Operations (Senate Report 94–354, 94th Congress, 1st Session). It is therefore not necessary to discuss in detail the provisions of the bill which were approved without change by this Committee.

The consideration by the Committee on the Judiciary included two days of hearings on March 24 and 25, 1976. The committee further had the advantage of the previous hearings in the House and the Senate and the reports referred to above. The amendments recommended by the Committee are based on its consideration of the reports, testimony before the committee, and the material relating to the previous considerations made available to the Committee.

Agencies Subject to the Bill

Witnesses appearing at the hearing before this committee discussed the provisions of the bill which define the agencies which will be subject to its provisions. As has been indicated in the outline of provisions of the bill, the term "agency" is to include Government authorities as

defined in the Administrative Procedure Act provisions of section 551 and section 552(e) of title 5 with the further qualification that in order to be covered, an agency must be headed by a collegial body of two or more members, a majority of whom are appointed to their position by the President with the advice and consent of the Senate. The Senate report, in discussing the similar provisions of the bill before that body, included a list of agencies that would be covered by the bill. In view of the similarity of the provisions contained in the present bill and the bill S. 5, considered by the Senate, the list developed by the Senate is included at this point to indicate the potential coverage of the bill. However, the definition will govern the actual application of the bill rather than the list set out below. The list is as follows:

Board for International Broadcasting;
Civil Aeronautics Board;
Commodity Credit Corporation (Board of Directors);
Commodity Futures Trading Commission;
Consumer Product Safety Commission;
Equal Employment Opportunity Commission;
Export-Import Bank of the United States (Board of Directors);
Federal Communications Commission;
Federal Election Commission;
Federal Deposit Insurance Corporation (Board of Directors);
Federal Farm Credit Board within the Farm Credit Administration;
Federal Home Loan Bank Board;
Federal Maritime Commission;
Federal Power Commission;
Federal Reserve Board;
Federal Trade Commission;
Harry S. Truman Scholarship Foundation (Board of Trustees);
Indian Claims Commission;
Inter-American Foundation (Board of Directors);
Interstate Commerce Commission;
Legal Services Corporation (Board of Directors);
Mississippi River Commission;
National Commission on Libraries and Information Science;
National Council on Educational Research;
National Council on Quality in Education;
National Credit Union Board;
National Homeownership Foundation (Board of Directors);
National Labor Relations Board;
National Library of Medicine (Board of Regents);
National Mediation Board;
National Science Board of the National Science Foundation;
National Transportation Safety Board;
Nuclear Regulatory Commission;
Occupational Safety and Health Review Commission;
Overseas Private Investment Corporation (Board of Directors);
Parole Board;
Railroad Retirement Board;
Renegotiation Board;
Securities and Exchange Commission;

Tennessee Valley Authority (Board of Directors);
Uniformed Services University of the Health Sciences (Board of Regents);
U.S. Civil Service Commission;
U.S. Commission on Civil Rights;
U.S. Foreign Claims Settlement Commission;
U.S. International Trade Commission;
U.S. Postal Service (Board of Governors); and
U.S. Railway Association;

The committee considered the various suggestions concerning changes in the description of agencies covered by the bill and concluded that the general definition provides the best approach and therefore did not change the language as contained in the bill referred to the committee.

Meetings Subject to New Section 552b

A considerable portion of the testimony presented to the committee concerning the definition of "meeting" is included in the new section. The language of the bill as referred to the committee provided that a meeting would consist of "deliberations" which concern the joint conduct or disposition of agency business. It was pointed out that this language could make it difficult to identify a meeting in advance of that meeting, or to determine whether the "meeting" was one actually covered by the provisions contained in the bill. The subcommittee considering the bill recommended language which was intended to remedy this situation and provide the basis for adequate and meaningful notice required by the bill of the date and place of meetings, their subject matter, and whether they would be open or closed to the public. This language underwent further modification before the Full Committee and the language ultimately approved by the committee was to provide that "meeting" would be defined as "an assembly or simultaneous communication concerning the joint conduct or disposition of agency business by two or more, but at least the number of individual agency members required to take action on behalf of the agency, but does not include meetings required or permitted by subsection (d)". This definition makes it possible to determine and define the basic purpose of the meeting. As is indicated in the outline of provisions of the bill and also in the explanation of committee amendments, this definition must be read in the light of the amendment made to subsection (b) of new section 552b which prohibits the conduct or disposition of agency business other than as provided in subsections (b) through (g) of new section 552b. The definition of "meeting" contains the qualification that the term "meeting" for the purposes of the section will not include meetings required or permitted by subsection (d), a subsection which concerns the closing of meetings. As a result, it will be possible for agencies to make the necessary decisions concerning opening or closing meetings prior to the holding of covered meetings without being subject to the detailed procedures provided for in the balance of section 552b.

Clarification Concerning Exceptions

The committee considered the provisions of the exemption provided in subsection (c)(3) of section 552b concerning the disclosure of in-

formation required to be withheld from the public by any statute establishing particular criteria or referring to particular types of information. This exemption was discussed at page 9 of the report of the Committee on Government Operations, which pointed out that, under the original language of this bill, a statute that permits withholding rather than actually requiring it would not come within the exception provided in the paragraph. While the committee agrees that the language concerning criteria or types of information should be retained, it was felt that limiting the exemption to information required to be withheld by statute would be too restrictive. Rather, the exemption should extend to those statutes which require or permit information to be withheld from the public where the statute establishes criteria or refers to particular types of information.[2]

The exemptions contained in subsection (c) of the new section are based on the exemptions presently contained in the Freedom of Information Act provisions of section 552 of Title 5. The latter exemptions relate to governmental records and in most instances, this same or similar language can be applied to information being presented at a meeting. However, it was brought to the attention of the committee that in connection with exemption No. 7, the exemption relating to investigatory records compiled for law enforcement purposes, it was important to qualify the provision to the extent that the exemption would be clearly applicable in addition to records to information which if written would be contained in such records. This is in the nature of a technical amendment which the committee feels is consistent with the basic purpose of the exemption in its original form. In the course of subcommittee consideration of this exemption, there was a discussion of whether there should be a change in the language to cover matters discussed at the agency meetings at an early stage of the investigation when it was not clear whether enforcement proceedings would actually be instituted. However, after a discussion, it was felt that the existing language was adequate to meet the situation.

Exemption 9 of subsection (c) of new section provides an exception relating to the withholding of information where premature disclosure would, in the case of an agency which regulates currency, securities, commodities or financial institutions, be likely to lead to significant financial speculation or significantly endanger the ability of a financial institution. The exemption would also apply to information where premature disclosure would likely significanty frustrate the implementation of proposed agency action. However, the latter exemption would not be available where the content or nature of the agency action has been disclosed to the public. It was objected that the time when this bar to the application of the exemption would go into effect was not clear by the use of the term "where". Accordingly, the committee recommended an amendment to substitute the word "after" so that the exemption would not be available after the content or nature of the proposed action had been disclosed by the agency. In a conforming amendment, the term "unless" was inserted so that the agency disclosure required by law would also be covered. A similar amendment was made to the same provision which in effect provided that the exemp-

[2] This would clarify the fact that statutes such as 50 U.S.C. 403(d)(3) concerning security information and 8 U.S.C. 222 concerning confidential records of the State Department concerning visas and related matters, are included.

tion would not be available after publication of agency notice of rule-making pursuant to section 553(d) of Title 5.

The committee also added a clarification to the exemption No. 10 which concerns agency participation in litigation or related matters. The qualification is to add the term "or proceeding" to the reference to agency participation in a civil action so that the exemption would clearly apply to information relating to the agency's participation in a civil action or proceeding.

Transcript Requirement

Subsection (f)(1) of the new section requires that a complete transcript or an electronic recording which is adequate to record the proceedings shall be made of each agency meeting or portion of a meeting closed to the public with the single exception of meetings closed to the public pursuant to paragraph 10 of subsection (c). The committee considered the difficulties incident to the review of the transcript of closed meetings required by the original provisions of the bill. The bill would have required that each deletion authorized by an exception in the section would be made by recorded vote of the agency taken subsequent to the meeting. It was pointed out this would require a considerable expenditure of the time of the senior officials of the agency and that this would be cumbersome and time-consuming. It was determined that the intent of the bill could be adequately carried out by deleting this provision and similarly deleting the provision requiring a written explanation of the reason and statutory basis for each deletion. These amendments would not change the requirements of the section making revised copies of the transcript or transcription of the electronic recordings available to any person upon payment of the cost of duplication or its transcription. Further, it is provided that if the agency determines it to be in the public interest, the material can be made available to the public without cost. The complete verbatim copy of the transcription or the complete electronic recording of each meeting closed to the public would be maintained by the agency for at least two years after the meeting or until one year after the conclusion of the agency proceeding with respect to which the meeting was held, whichever occurs later.

Court Jurisdiction Under Section 552b(h)

Subsection (h) provides jurisdiction in the district courts of the United States to enforce the requirements of sections (b) through (f) of the new section. Such actions may be brought by any person against the agency prior to or within sixty days after the meeting at which the alleged violation of the section occurred. The time limit would be varied in the event that a public announcement of the meeting had not been made in accordance with the requirements of the section. The original version of the bill would have provided jurisdiction in the courts to bring such actions against the agency or its members. The committee recommended the deletion of the provision for joinder of members for since the subsection authorizes an action against the agency, there would be no necessity to join individual members to gain court jurisdiction. Further, as is discussed below, the

committee also amended the bill to delete the provision authorizing the assessment of court costs against individual agency members. As was pointed out in the explanation of the committee amendments, these amendments remove the objection that individual agency members would be subjected to suit for official acts and possibly being asessed costs and attorneys fees in these circumstances. In line with these principles, the committee recommends the deletion of the provision in original subsection (j) which would have permitted the asessment of costs against individual members of an agency.

Objections were raised at the hearings on the bill concerning the breadth of the provisions concerning venue for actions authorized by the bill. The committee concluded that there should be no limitation upon the jurisdiction provided in the bill nor persons who could bring the actions contemplated by the bill. However, the bill concerns meetings and matters relating to meetings that have a definite relation to certain locations, and the practical aspects concerning government action and court consideration of these matters make it logical to provide venue in the district where the agency meeting is held, where the agency has its headquarters, or in the District Court for the District of Columbia.

Scope of Judicial Review

Subsection (i) of subsection 552b as contained in the bill referred to the committee would have provided that any federal court otherwise authorized by law to review agency action could on application of any person properly participating in the judicial review proceedings inquire into the violations of the requirements of the section and afford any relief deemed appropriate. The committee recommends deletion of this language. As was outlined in the explanation of the committee amendments, it was concluded that the provisions of section 706 of title 5 of the Administrative Procedure Act provides adequate authority to inquire into the matters apparently referred to in original subsection (i). Section 706 concerns judicial review and details the basis for invalidating agency action. Item 2(d) as contained in that section authorizes a court to set aside agency action which was taken "without observance of proceedings required by law". In consideration of matters covered by this section, the courts, in reviewing actions, would then therefore be prepared to proceed in accordance with their normal procedures under Section 706. The weight to be given violations of the provisions of section 552b would be considered as are other matters covered by this provision in the Administrative Procedure Act. The reviewing court would then be in a position to determine whether the violation was of material prejudice to the party involved.

Ex Parte Communications

The provisions added to Section 557 of title 5 of the United States Code by Section 4(a) of the bill are almost identical to the provisions contained in the bill H.R. 10197, presently pending before this committee. The bill H.R. 10197 was the subject of a hearing before this committee's Subcommittee on Administrative Law and Governmental Relations on December 4, 1975. At that hearing testimony was received from the American Bar Association in support of the provisions gov-

erning ex parte communications. At that hearing it was noted that the provisions of H.R. 10197 on this subject paralleled the provisions on the same subject contained in S. 5, the Senate companion measure to the present bill, H.R. 11656. At that time, the American Bar Association witness stated that the provisions in the Senate version were acceptable to his Association. The provisions in the bill H.R. 11656 have a different numbering system, but otherwise are substantially identical to the provisions referred to in the Senate bill, S. 5.

In order to ensure both fairness and soundness to adjudication and formal rule making, the applicable provisions of the Administrative Procedure Act require a hearing and decision on the record. Such hearings give all parties an opportunity to participate and to rebut others' presentations. Such proceedings cannot be fair or soundly decided, however, when persons outside the agency are allowed to communicate with the decision-maker in private and others are denied the opportunity to respond.

The present Administrative Procedure Act provisions of title 5 do place a degree of limitation on ex parte communications, but the coverage is not as complete as would be provided by this bill. For example, ex parte contacts with agency heads are not covered and neither are contacts relating to formal, on-the-record rulemaking hearings. The language of this bill would close the loopholes, and would prohibit all external ex parte communications between agency members (and decisional employees) and persons outside the agency regarding the merits of any formal proceeding. The proposal also provides that any prohibited communication received by an agency must be placed on the public record and that the agency may rule against the person who made the communication as a sanction for doing so. The bill therefore establishes a prohibition against ex parte communications in such formal, trial-type proceedings. It applies to all agencies governed by the Administrative Procedure Act. While this is presently implied by section 556(e) of the Administrative Procedure Act which states that "the transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitute the exclusive record for decision", the Administrative Procedure Act provisions of title 5 contain no general statutory prohibition against ex parte contacts. To invalidate an agency proceeding because of ex parte contacts, a court must rely on constitutional standards, rather than specific provisions. *Sangamon Valley Television Corp.* v. *F.C.C.*, 269 F.2d 221 (1959). This bill would therefore provide for the first time a clear, statutory prohibition of ex parte contacts of general applicability.

The prohibition only applies to formal agency adjudication. Informal rulemaking proceedings and other agency actions that are not required to be on the record after an opportunity for a hearing will not be affected by the provision.

The ex parte rules established by this section do not repeal or modify the ex parte rules agencies have already adopted by regulation, except to the extent the regulations are inconsistent with this section. If an agency already has more stringent restrictions against ex parte contacts, this section will supplement those provisions. It is expected that each agency will issue new regulations applying the general provisions of this section in a way best designed to meet its special needs and circumstances.

The bill forbids ex parte communications between interested persons outside the agency and agency decisionmakers. The provision exempts only those ex parte communications authorized by law to be disposed of in such a manner. This exemption includes, for example, requests by one party to a proceeding for subpenas, adjournments, and continuances.

Contacts are forbidden between an interested person outside the agency and any agency member, administrative law judge, or other employee involved in the decisionmaking process. The word "employee" includes both those working for the agency full time and individuals working on a part-time basis, such as consultants.

The wording "interested persons" covers any individual or other person with an interest in the agency proceeding that is greater than the general interest the public as a whole may have. The term includes, but is not limited to, parties, competitors, public officials, and nonprofit or public interest organizations and associations with a special interest in the matter regulated. As used in this section, "person" has the same meaning as elsewhere in the Administrative Procedure Act.

The rule applies to interested persons who "make or knowingly cause to be made" an ex parte communication. The latter phrase contemplates indirect contacts which the interested person approves or arranges. For example, an interested person may ask another person outside the agency to make an ex parte communication. The section would apply to the individual who requested that the communication be made. However, if the second person contacts the agency about the first individual's interest in the case without that person's knowledge, approval, or encouragement, the first person would not be guilty of knowingly causing an ex parte contact.

Contacts are prohibited with any agency members, administrative law judge, or other employee who is or may reasonably be expected to be involved in the agency's deliberations. The words "may reasonably be expected" make it clear that absolute certainty is not required when predicting whether an agency employee will be involved in the decisional process. In some cases it will be clear that an employee does not come within the ambit of the provision. For example, an agency attorney litigating the case for the agency will not be involved in the decisionmaking process of the agency and would not be subject to the ex parte provision. Under other circumstances, the official's status may not be so clear. In such case, the fact that an interested person chooses to communicate with a particular employee in an ex parte manner is itself some evidence that the official may reasonably be expected to be involved in the decisional process. To assist the parties and the public in determining which agency officials may be involved in the decisional process, an agency may wish to publish, along with notice of the proceeding, a list of officials expected to be involved in the decisional process. The exparte rules would still apply to an agency official involved in the decisional process even if he were not on such a list.

Communications solely between agency employees are excluded from the section's prohibition. Of course, ex parte contacts by staff acting as agents for interested persons outside the agency are clearly within the scope of the prohibitions.

The subsection prohibits an ex parte communication only when it is "relevant to the merits of the proceeding." This phrase is intended to be construed broadly and to include more than the phrase "fact in issue" currently used in the Administrative Procedure Act. The phrase excludes procedural inquiries, such as requests for status reports, which will not have any effect on the way the case is decided. It excludes general background discussions about an entire industry which do not directly relate to specific ageny adjudication involving a member of that industry, or to formal rulemaking involving the industry as a whole. It is not the intent of this provision to cut an agency off from access to general information about an industry that an agency needs to exercise its regulatory responsibilities. So long as the communication containing such data does not directly discuss the merits of a pending adjudication it is not prohibited by this section.

However, a request for a status report or a background discussion about an industry may in effect amount to an indirect or subtle effort to influence the substantive outcome of the proceedings. The judgment will have to be made whether a particular communication could affect the agency's decision on the merits. In doubtful cases the agency official should treat the communication as ex parte so as to protect the integrity of the decisionmaking process.

The bill also prohibits agency officials who are or who may be involved in the decisional process from engaging in an ex parte contact with an interested person. It embodies the same standards as are provided in paragraph (A) of new subsection (d)(1) of section 557 concerning persons outside the agency.

If an ex parte communication is made or received by an agency official, he must place on the proceeding's public record: (1) any illegal written communication, (2) a memorandum stating the substance of any illegal oral communication, and (3) any oral or written statements made in response to the original ex parte communication. The "public record" of the proceeding means the public docket or equivalent file containing all the material relevant to the case readily available to the parties and the public generally. Material may be part of the public record even though it has not been admitted into evidence.

The purpose of this provision is to notify the opposing party and the public, as well as all decisionmakers, of the improper contact and give all interested persons a chance to reply to anything contained in the illegal communication. In this way the secret nature of the contact is effectively eliminated. Agency officials who make an ex parte contact are under the same obligation to record it publicly as when an agency official receives such a communication. In some cases, merely placing the ex parte communication on the public reord will not, in fact, provide sufficient notice to all the parties. In the Senate report (Sen. Rpt. 94–354) on S. 5 it was suggested that in such cases each agency should consider requiring by regulation that in certain cases actual notice of the ex parte communication be provided all parties.

An officer presiding over the agency hearings in the proceedings may require a party who makes a prohibited ex parte communication to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded or otherwise aversely affected because of the violation. This provision parallels the amendment provided in section 4(c) of the bill to section 556(d), which authorizes an agency to consider a violation of this section as grounds for rul-

ing against a party on the merits. The new language insures that the record of the proceeding contains adequate information about the violation. The presiding officer need not require a party committing an ex parte contact to show cause in every instance why the agency should not rule against him. The matter rests within his discretion.

The presiding officer should require such a showing only if consistent with the interests of justice and the policy of the underlying statutes. Thus a showing should be required where, among other factors, there will be shown to have been made knowingly, but not where the violation was clearly inadvertent.

The bill provides that the prohibitions against ex parte communications apply as soon as a proceeding is noticed for a hearing. However, if a person initiating a communciation before that time is aware that notice of the hearings will be issued, the prohibitions would apply from the time the person gained such awareness. An agency may require that the provisions of this section apply at any point in the proceedings prior to issuance of the notice of hearings.

Subsection (c) of section 4 of the bill adds a definition of "ex parte communication" to the definitions contained in the Administrative Procedure Act in section 551 of title 5. The term means an "oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given." A communication is not ex parte if either, (1) the person making it placed it on the public record at the same time it was made, or (2) all parties to the proceeding had reasonable advance notice. If a communication falls into either one of these two categories, it is not ex parte. Where advance notice is given, it should be adequate to permit other parties to prepare a possible response and to be present when the communication is made. "Public record" means the docket or other public file containing all the material relevant to the proceedings. It includes, but is not limited to, the transcript of the proceedings, material that has been accepted as evidence in the proceeding, and the public file of related matters not accepted as evidence in the proceeding. An individual who writes a letter concerning the merits of the proceeding to a commissioner, and who places a copy of the letter at the same time in the transcript of the proceedings, would not have made an ex parte communication. However, a party who wrote the same letter and sent it only to a commissioner, would have committed a violation of the section even if the commissioner subsequently placed the letter in the public record.

Subsection (c) of section 4 of the bill amends section 556(d) of title 5, so as to authorize an agency to render a decision adverse to a party violating the prohibition against ex parte communications. It is intended that this provisioin apply to both formal parties, and to intervenors whose interests are equivalent to those of a party. This possible sanction supplements an agency's authority to censure or dismiss an official who engages in a nillegal ex parte communication, or to prohibit an attorney who violates the section from practicing before the agency. Such an adverse decision must be "consistent with the interests of justice and the policy of the underlying statutes." The Senate Report noted that one example would be an instance in which the interests of justice might dictate that a claimant for an old age benefit not lose his claim even if he violates the ex parte rules. On the other hand, where two parties have applied for a license and the applications are

of relatively equal merit, an agency may rule against a party who approached an agency head in an ex parte manner in an effort to win approval of his license.

The subsection specifies that an agency may rule against a party for making an ex parte communication only where the party made the illegal contact knowingly. An inadvertent ex parte contact must still be remedied by placing it on the public record. If the agency believes that such an unintentional ex parte contact has irrevocably tainted the proceeding, it may require the parties to make a new record. However, an agency should not definitively rule against a party simply because of an inadvertent violation.

Committee Vote

On April 6, 1976, the Full Committee on the Judiciary approved the bill H.R. 11656 by voice vote.

Conclsion

The Committee has concluded that the facts developed in the hearings on the bill and as outlined in this report demonstrate the need for legislative action with reference to meetings of the agencies covered by the provisions of the bill. It is recommended that the amended bill be considered favorably.

Cost

(Rule XII (7) (a) (1) of the House Rules)

The bill does not provide for any specific new government programs. As has been outlined in the report, the bill concerns amendments to the law concerning administrative procedures and adds new language concerning ex parte communications in connection with adjudication and formal rule making. Other than outlined below and in the Budget Office estimate it is not contemplated that those procedural changes will add significant cost to government activity.

The ex parte provisions of the legislation should result in no additional costs.

Most of the costs incurred in connection with the open meeting provisions will be for the clerical and administrative work they require, and it is estimated that such costs will be minimal.

Under the bill, the agency meetings open to the public will not require transcripts or electronic recordings. In most instances, minutes are already taken at such meetings, so the only additional expense will be that of duplicating one or more sets of the minutes to be made available to the public. (As provided in the bill, a member of the public desiring his own set of the minutes will bear the expense of copying, unless the agency deems it is in the public interest to supply them without cost.) The only other cost of an open meeting under this legislation is that of the public announcement.

An agency closing a portion of a meeting will have to make a transcript or electronic recording thereof. There will be approximately 50 covered agencies and the cost should therefore be directly proportional to the number of closed meetings. This cost could be further reduced if an electronic recording device, rather than stenographic notation,

is used. The cost of electronic recording equipment is estimated at a few thousand dollars per covered agency. The cost of transcription will be borne in large measure by members of the public requesting copies of transcripts.

Statement Under Clause 2(l)(3) and Clause 2(l)(4) of Rule XI of the Rules of the House of Representatives

A. OVERSIGHT STATEMENT

This report embodies the findings and recommendations of the Subcommittee on Administrative Law and Governmental Relations pursuant to its oversight responsibility over administrative procedures of the Federal Government and its jurisdiction over the Administrative Procedure Act as codified in title 5, United States Code, pursuant to the procedures relating to oversight under Rule VI(b) of the Rules of the Committee on the Judiciary, and the committee has determined that legislation should be enacted as set forth in the amended bill.

B. BUDGET STATEMENT

As has been indicated in the committee statement as to cost made pursuant to Rule XIII(7)(a)(1) the bill concerns administrative procedure and requirements concerning meetings of the agencies covered by the bill. Other than as required by the items of expense referred to in the attached estimate of the Congressional Budget Office, the bill should not involve new budget authority or require appreciable new or increased tax expenditures as contemplated by Clause 2(l)(3)(B) of Rule XI.

C. ESTIMATE OF THE CONGRESSIONAL BUDGET OFFICE

The estimate or comparison was received from the Director of the Congressional Budget Office, as referred to in subdivision (C) of Clause 2(l)(3) of House Rule XI, by the Commission on Government Operations and is set forth below. Unless otherwise stated, all figures represent cumulative totals for the approximately 50 agencies covered by the open meeting provisions of the bill:

Cost Estimate

Any projections of the costs of the "Sunshine Act" has to be tentative since the number of recording devices it will be necessary to buy and the amount of clerical time involved is difficult to estimate. With this limitation, the costs of making the proceedings of closed meetings available to the public could be $30,000 for new recording equipment and $130,000 annually for additional clerical help. Assuming a starting date of July 1, 1977, the budget impact would be:

Transition quarter	[1] 62,500
Fiscal year 1977	130,000
Fiscal year 1978	[2] 138,000
Fiscal year 1979	145,000
Fiscal year 1980	152,000
Fiscal year 1981	160,000

[1] $30,000 for recording devices, 25 percent of $130,000 in personnel costs.
[2] Salaries are tied to the changes in the CPI at a 5-percent real growth rate in GNP.

Basis of Estimate

The cost of a conference recording device should be about $400. This analysis has assumed that half of the fifty or so agencies in question will purchase one new recording machine, and that the other half will require two.

As for hiring additional clerical help, the assumption here is that one-quarter of the fifty agencies will do so at an average salary of $10,000 annually. If Congressional expectations that there will be few closed meetings are realized, this estimate on personnel could be on the high side of the spectrum.

Estimate Comparison

Senate Report 94–354 estimates that the cost per agency will be a few thousand dollars. The CBO cost projections are also in that range.

D. OVERSIGHT FINDINGS AND RECOMMENDATIONS OF THE COMMITTEE ON GOVERNMENT OPERATIONS

No findings or recommendations of the Committee on Government Operations were received as referred to in subdivision (D) of clause 2(l)(3) of House Rule XI, however, the committee did have the advantage of the material contained in that Committee's legislative report, H. Rept. No. 94880, Part I, on this bill.

Inflationary Impact

In compliance with clause (l)(4) of House Rule XI it is stated that enactment of this legislation will have no inflationary impact on prices and costs in the operation of the national economy. The bill provides for the procedural matters referred to above. It does not provide for any new programs.

Changes in Existing Law Made by the Bill, as Reported

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

Title 5, United States Code

* * * * * * *

CHAPTER 5—ADMINISTRATIVE PROCEDURE

SUBCHAPTER I—GENERAL PROVISIONS

Sec.
500. Administrative practice; general provisions.
501. Advertising practice; restrictions.
502. Administrative practice; Reserves and National Guardsmen.
503. Witness fees and allowances.

SUBCHAPTER II—ADMINISTRATIVE PROCEDURE

551. Definitions.
552. Public information; agency rules, opinions, orders, records and proceedings.
552a. Records about individuals.
552b. Open meetings.
553. Rule making.
554. Adjudications.
555. Ancillary matters.
556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision.
557. Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record.
558. Imposition of sanctions; determination of applications for licenses; suspension, revocation, and expiration of licenses.
559. Effect on other laws; effect of subsequent statute.

SUBCHAPTER III—ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

571. Purpose.
572. Definitions.
573. Administrative Conference of the United States.
574. Powers and duties of the Conference.
575. Organizations of the Conference.
576. Appropriations.

* * * * * * *

SUBCHAPTER II—ADMINISTRATIVE PROCEDURE

§ 551. Definitions

For the purpose of this subchapter—

(1) * * *

* * * * * * *

(12) "agency proceedings" means an agency process as defined by paragraphs (5), (7), and (9) of this section; [and]

(13) "agency action" includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act[.] *; and*

(14) "ex parte communication" means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given.

* * * * * * *

§ 552. Public information; agency rules, opinions, orders records, and proceedings

(a) * * *

* * * * * * *

(b) This section does not apply to matters that are—

(1) * * *

* * * * * * *

[(3) specifically exempted from disclosure by statute:]

(3) required or permitted to be withheld from the public by any statute establishing particular criteria or referring to particular types of information;

* * * * * * *

§ 552b. Open Meetings

(a) For purposes of this section—

(1) the term "agency" means the Federal Election Commission and any agency, as defined in section 552(e) of this title, headed by a collegial body composed of two or more individual members, a majority of whom are appointed to such position by the President with the advice and consent of the Senate, and includes any subdivision thereof authorized to act on behalf of the agency;

(2) the term "meeting" means an assembly or simultaneous communication concerning the joint conduct or disposition of agency business by two or more, but at least the number of individual agency members required to take action on behalf of the agency, but does not include meetings required or permitted by subsection (d); and

(3) the term "member" means an individual who belongs to a collegial body heading an agency.

(b) (1) Members as described in subsection (a) (2) shall not jointly conduct or dispose of agency business without complying with subsections (b) through (g).

(2) Except as provided in subsection (c), every portion of every meeting of an agency shall be open to public observation.

(c) Except in a case where the agency finds that the public interest requires otherwise, subsection (b) shall not apply to any portion of an agency meeting and the requirements of subsections (d) and (e) shall not apply to any information pertaining to such meeting otherwise required by this section to be disclosed to the public, where the agency properly determines that such portion or portions of its meeting or the disclosure of such information is likely to—

(1) disclose matters (A) specifically authorized under criteria established by an Executive order to be kept secret in the interests of national defense or foreign policy and (B) in fact properly classified pursuant to such Executive order;

(2) relate solely to the internal personnel rules and practices of an agency;

(3) disclose information required or permitted to be withheld from the public by any statute establishing particular criteria or referring to particular types of information;

(4) disclose trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) involve accusing any person of a crime, or formally censuring any person;

(6) disclose information of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy;

(7) disclose investigatory records compiled for law enforcement purposes, or information which if written would be contained in such records, but only to the extent that the production of such records or information would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an

agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;

(8) disclose information contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions;

(9) disclose information the premature disclosure of which would—

(A) in the case of an agency which regulates currencies, securities, commodities, or financial institutions, be likely to (i) lead to significant financial speculation, or (ii) significantly endanger the stability of any financial institution; or

(B) in the case of any agency, be likely to significantly frustrate implementation of a proposed agency action, except that this subparagraph shall not apply in any instance after the content or nature of the proposed agency action has been disclosed to the public by the agency, unless the agency is required by law to make such disclosure prior to taking final agency action on such proposal, or after the agency publishes or serves a substantive rule pursuant to section 553(d) of this title; or

(10) specifically concern the agency's issuance of a subpena, or the agency's participation in a civil action or proceeding, an action in a foreign court or international tribunal, or an arbitration, or the initiation, conduct, or disposition by the agency of a particular case of formal agency adjudication pursuant to the procedures in section 554 of this title or otherwise involving a determination on the record after opportunity for a hearing.

(d)(1) Action under subsection (c) to close a portion or portions of an agency meeting shall be taken only when a majority of the entire membership of the agency votes to take such action. A separate vote of the agency members shall be taken with respect to each agency meeting a portion or portions of which are proposed to be closed to the public pursuant to subsection (c). A single vote may be taken with respect to a series of portions of meetings which are proposed to be closed to the public, or with respect to any information concerning such series, so long as each portion of a meeting in such series involves the same particular matters, and is scheduled to be held no more than thirty days after the initial portion of a meeting in such series. The vote of each agency member participating in such vote shall be recorded and no proxies shall be allowed.

(2) Whenever any person whose interests may be directly affected by a portion of a meeting requests that the agency close such portion to the public for any of the reasons referred to in paragraph (5), (6), or (7) of subsection (c), the agency, upon request of any one of its members, shall vote by recorded vote whether to close such meeting.

(3) Within one day of any vote taken pursuant to paragraph (1) or (2), the agency shall make publicly available a written copy of such vote reflecting the vote of each member on the question. If a portion of a meeting is to be closed to the public, the agency shall, within one day

80-459 O - 77 - 38

of the vote taken pursuant to paragraph (1) or (2) of this subsection, make publicly available a full written explanation of its action closing the portion together with a list of all persons expected to attend the meeting and their affiliation.

(4) Any agency, a majority of whose meetings may properly be closed to the public pursuant to paragraph (4), (8), (9)(A), or (10) of subsection (c), or any combination thereof, may provide by regulation for the closing of such meetings or portions thereof in the event that a majority of the members of the agency votes by recorded vote at the beginning of such meeting, or portion thereof, to close the exempt portion or portions of the meeting, and a copy of such vote, reflecting the vote of each member on the question, is made available to the public. The provisions of paragraphs (1), (2), and (3) of this subsection and subsection (e) shall not apply to any portion of a meeting to which such regulations apply: Provided, That the agency shall, except to the extent that such information is exempt from disclosure under the provisions of subsection (c), provide the public with public announcement of the date, place, and subject matter of the meeting and each portion thereof at the earliest practicable time and in no case later than the commencement of the meeting or portion in question.

(e) In the case of each meeting, the agency shall make public announcement, at least one week before the meeting, of the date, place, and subject matter of the meeting, whether it is to be open or closed to the public, and the name and phone number of the official designated by the agency to respond to requests for information about the meeting. Such announcement shall be made unless a majority of the members of the agency determines by a recorded vote that agency business requires that such meeting be called at an earlier date, in which case the agency shall make public announcement of the date, place, and subject matter of such meeting, and whether open or closed to the public, at the earliest practicable time and in no case later than the commencement of the meeting or portion in question. The time, place, or subject matter of a meeting, or the determination of the agency to open or close a meeting, or portion of a meeting, to the public, may be changed following the public announcement required by this paragraph only if (1) a majority of the entire membership of the agency determines by a recorded vote that agency business so requires and that no earlier announcement of the change was possible, and (2) the agency publicly announces such change and the vote of each member upon such change at the earliest practicable time and in no case later than the commencement of the meeting or portion in question.

(f)(1) A complete transcript or electronic recording adequate to record fully the proceedings shall be made of each meeting, or portion of a meeting, closed to the public, except for a meeting, or portion of a meeting, closed to the public pursuant to paragraph (10) of subsection (c). The agency shall make promptly available to the public, in a location easily accessible to the public, the compete transcript or electronic recording of the discussion at such meeting of any item on the agenda, or of the testimony of any witness received at such meeting, except for such portion or portions of such discussion or testimony as the agency determines to contain information specified in paragraphs (1) through (10) of subsection (c). Copies of such

transcript, or a transcription of such electronic recording disclosing the identity of each speaker, shall be furnished to any person at no greater than the actual cost of duplication or transcription or, if in the public interest, at no cost. The agency shall maintain a complete verbatim copy of the transcript, or a complete electronic recording of each meeting, or portion of a meeting, closed to the public, for a period of at least two years after such meeting, or until one year after the conclusion of any agency proceeding with respect to which the meeting, or a portion thereof, was held, whichever occurs later.

(2) Written minutes shall be made of any agency meeting, or portion thereof, which is open to the public. The agency shall make such minutes promptly available to the public in a location easily accessible to the public, and shall maintain such minutes for a period of at least two years after such meeting. Copies of such minutes shall be furnished to any person at no greater than the actual cost of duplication thereof or, if in the public interest, at no cost.

(g) Each agency subject to the requirements of this section shall, within 180 days after the date of enactment of this section, following consultation with the Office of the Chairman of the Administrative Conference of the United States and published notice in the Federal Register of at least thirty days and opportunity for written comment by any persons, promulgate regulations to implement the requirements of subsections (b) through (f) of this section. Any person may bring a proceeding in the United States District Court for the District of Columbia to require an agency to promulgate such regulations if such agency has not promulgated such regulations within the time period specified herein. Subject to any limitations of time therefor provided by law, any person may bring a proceeding in the United States Court of Appeals for the District of Columbia to set aside agency regulations issued pursuant to this subsection that are not in accord with the requirements of subsections (b) through (f) of this section, and to require the promulgation of regulations that are in accord with such subsections.

(h) The district courts of the United States have jurisdiction to enforce the requirements of subsections (b) through (f) of this section. Such actions may be brought by any person against an agency prior to, or within sixty days after, the meeting out of which the violation of this section arises, except that if public announcement of such meeting is not initially provided by the agency in accordance with the requirements of this section, such action may be instituted pursuant to this section at any time prior to sixty days after any public announcement of such meeting. Such actions may be brought in the district court of the United States for the district in which the agency meeting is held, or in the District Court for the District of Columbia, or where the agency in question has its headquarters. In such actions a defendant shall serve his answer within twenty days after the service of the complaint, but such time may be extended by the court for up to twenty additional days upon a showing of good cause therefor. The burden is on the defendant to sustain his action. In deciding such cases the court may examine in camera any portion of a transcript or electronic recording of a meeting closed to the public, and may take such additional evidence as it deems necessary. The court, having due regard for orderly administration and the public interest, as well as the interests of the party,

may grant such equitable relief as it deems appropriate, including granting an injunction against future violations of this section, or ordering the agency to make available to the public such portion of the transcript or electronic recording of a meeting as is not authorized to be withheld under subsection (c) of this section. Nothing in this section confers jurisdiction on any district court acting solely under this subsection to set aside, enjoin or invalidate any agency action taken or discussed at an agency meeting out of which the violation of this section arose.

(i) The court may assess against any party reasonable attorney fees and other litigation costs reasonably incurred by any other party who substantially prevails in any action brought in accordance with the provisions of subsection (g) or (h) of this section, except that costs may be assessed against the plaintiff only where the court finds that the suit was initiated by the plaintiff primarily for frivolous or dilatory purposes. In the case of assessment of costs against an agency, the costs may be assesed by the court against the United States.

(j) Each agency subject to the requirements of this section shall annually report to Congress regarding its compliance with such requirements, including a tabulation of the total number of agency meetings open to the public, the total number of meetings closed to the public, the reasons for closing such meetings, and a description of any litigation brought against the agency under this section, including any costs assessed against the agency in such litigation (whether or not paid by the agency).

(k) Except as specifically provided in this section, nothing herein expands or limits the present rights of any person under section 552 of this title, except that the provisions of this Act shall govern in the case of any request made pursuant to such action to copy or inspect the transripts or electronic recordings described in subsection (f) of this section. The requirements of chapter 33 of title 44, United States Code, shall not apply to the transcripts and electronic recordings described in subsection (f) of this section.

(l) This section does not constitute authority to withhold any information from Congress, and does not authorize the closing of any agency meeting or portion thereof otherwise required by law to be open.

(m) Nothing in this section authorizes any agency to withhold from any individual any record, including transcripts or electronic recordings required by this Act, which is otherwise accessible to such individual under section 552a of this title.

(n) In the event that any meeting is subject to the provisions of the Federal Advisory Committee Act as well as the provisions of this section, the provisions of this section shall govern.

* * * * * * *

§ 556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision

(a) * * *

* * * * * * *

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide

for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. *The agency may, to the extent consistent with the interests of justice and the policy of the underlying statutes administered by the agency, consider a violation of section 557(d) of this title sufficient grounds for a decision adverse to a person or party who has committed such violation or caused such violation to occur.* A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

* * * * * * *

§ 557. Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record

(a) * * *

(d) (1) In any agency proceeding which is subject to subsection (a) of this section, except to the extent required for the disposition of ex parte matters as authorized by law—

(A) no interested person outside the agency shall make or cause to be made to any member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, an ex parte communication relative to the merits of the proceeding;

(B) no member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, shall make or cause to be made to any interested person outside the agency an ex parte communication relative to the merits of the proceeding;

(C) a member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of such proceeding who receives, or who makes or causes to be made, a communication prohibited by this subsection shall place on the public record of the proceeding:

(i) all such written communications;

(ii) memoranda stating the substance of all such oral communications; and

(iii) all written responses, and memoranda stating the substance of all oral responses, to the materials described in clauses (i) and (ii) of this subparagraph;

(D) in the event of a communication prohibited by this subsection and made or caused to be made by a party or interested person, the agency, administrative law judge, or other employee presiding at the hearing may, to the extent consistent with the interests of justice and the policy of the underlying statutes, require

the person or party to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation; and

(E) the prohibitions of this subsection shall apply beginning at such time as the agency may designate, but in no case shall they begin to apply later than the time at which a proceeding is noticed for hearing unless the person responsible for the communication has knowledge that it will be noticed, in which case the prohibitions shall apply beginning at the time of his acquisition of such knowledge.

(2) This section does not constitute authority to withhold information from Congress.

* * * * * * *

SECTION 410 OF TITLE 39, UNITED STATES CODE

§ 410. Application of other laws

(a) Except as provided by subsection (b) of this section, and except as otherwise provided in this title or insofar as such laws remain in force as rules or regulations of the Postal Service, no Federal law dealing with public or Federal contracts, property, works, officers, employees, budgets, or funds, including the provisions of chapters 5 and 7 of title 5, shall apply to the exercise of the powers of the Postal Service.

(b) The following provisions shall apply to the Postal Service:

(1) Section 552 (public information), *section 552a* (*records about individuals*), *section 552b* (*open meetings*), section 3110 (restrictions on employment of relatives), section 3333 and chapters 71 (employee policies) and 73 (suitability, security, and conduct of employees), and section 5532 (dual pay) of title 5, except that no regulation issued under such chapters or sections shall apply to the Postal Service unless expressly made applicable;

* * * * * * *

OVERSEAS PRIVATE INVESTMENT CORPORATION,
Washington, D.C., April 5, 1976.

Hon. PETER W. RODINO, Jr.,
Chairman, Committee on the Judiciary,
House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: The Overseas Private Investment Corporation (OPIC) offers the following additional comments regarding H.R. 11656, the Government in the Sunshine Act (the "bill").

Comments by OPIC regarding the bill were previously submitted to the Subcommittee on Government Information and Individual Rights, Committee on Government Operations, by letter dated November 26, 1975, a copy of which is included in the report of the hearings before the Subcommittee. As the bill was referred from the Government Operations Committee, there were several provisions that were of serious concern to OPIC. We believe some of these provisions have been improved. Nevertheless, the following matters remain of serious concern to us.

COMMENTS OF SPECIFIC PROVISIONS

1. *Closing Mettings by Regulation.*—Section 3(d)(4) of the bill authorizes agencies to adopt regulations for the closing of portions of meetings whenever a majority of the meetings of such agency may properly be closed to the public pursuant to paragraphs (4), (8), (9)(A) or (10) of Subsection (c). This section does not authorize the adoption of such regulations whenever the majority of such meetings would properly be closed under paragraph (1); i.e., whenever such meetings would involve the discussion of information kept secret for reasons of national security. OPIC believes that this is an error that should be corrected.

Of the forty-seven agencies that the Senate Report identifies as being subject to the provisions of section 201(section 3 of the companion bill), only a small minority would have the need to use with any frequency information classified for reasons of national security OPIC is one of the few such agencies which need to use classified information to the extent that a substantial portion of its meetings would be closed because the meetings would involve discussions of classified information.

OPIC's functions are an integral part of the foreign relations of the United States. Information properly kept secret for reasons of foreign relations is discussed in most meetings of OPIC's Board of Directors in connection with the Board's determination of policy issues with respect to OPIC's operations, the review of policy issues in projects to be considered by the Board of Directors and the review of events regarding actual or potential claims under OPIC insurance contracts or events that would affect an OPIC-financed project.

Since the majority of the meetings of OPIC's Board of Directors, or portions thereof, could properly be closed to the public for reasons of national security, OPIC's inability to adopt regulations pertaining to the closing of meetings under such circumstances would constitute an additional and unwarranted administrative burden. This is especially true because the need to discuss classified information cannot regularly be predicted in advance of a scheduled meeting, may necessitate special meetings on short notice, and, in the case of meetings of OPIC's Board of Directors, may not arise until after the meeting commences.

2. *Requirement of a Verbatim Transcript of Closed Meetings.*—OPIC still objects to the inclusion in the bill of the provisions requiring that a mandatory transcript be made of each meeting, or portion thereof, closed to the public. As long as the transcript requirement remains, the provisions of the bill permitting the closure of meetings do not provide adequate protection from public disclosure of information discussed at meetings. The exemptions merely provide standards to be used in determining whether any information to be discussed at a meeting is of such a nature as to justify withholding it from the public. Since the bill provides for *de novo* review by the courts, a judge could overrule an agency's determination (for instance, in the case of privileged business information) that such information is privileged even though it was furnished to the agency and discussed at a meeting on the assumption that information and the discussion

would not become available to others. This risk will clearly be a deterrent to full and free discussion of sensitive issues which the bill purports to protect.

Furthermore, in view of the fact that classified information, confidential business information and matters with respect to potential adjudication of claims would be discussed regularly at meetings of OPIC's Board of Directors, the costs of preparing a verbatim transcript of such meetings, or of editing any transcript or summary in order to delete discussions of sensitive materials, would be very high and burdensome. We have already provided information with respect to the administrative burden involved to the various Committees that have considered this matter.

As a workable alternative to the requirement for a verbatim transcript of all closed meetings or portions thereof, OPIC recommends an approach similar to that adopted by the Senate and the House in applying the open meeting concept to their own proceedings. Thus, for instance, a majority of a Committee may vote both to close one of its meetings to the public and either to have such closed meeting transcribed or not. To impose a more stringent requirement on the Executive Branch would result in a double standard of openness, one of flexibility for the Congress and the other of rigidity for executive agencies.

GENERAL COMMENTS

For the reasons set forth in pages 1 to 3 of our letter of November 26, 1975, to the Subcommittee on Government Information and Individual Rights, Committee on Government Operations, we reiterate our view that it is, in any event, inappropriate to include OPIC within the scope of the bill. OPIC is not a regulatory agency. It operates more like a private financial institution than a government agency. OPIC's Board of Directors must be free to examine and candidly discuss, as would the Board of Directors of a private financial institution, all aspects of underwriting policy, applications pending before the Board for insurance or financing, and matters concerning insurance claims. Involved in these discussions are candid assessments of individuals, companies and events and the liberal use of privileged business information and governmental information kept secret for reasons of foreign relations. Such discussions must be carried out in a confidential manner that is not adequately protected by the bill.

The requirement that a verbatim transcript must be maintained within respect to any closed meeting, and that any person may sue to obtain access to any such transcript, would result in the ever-present concern of the private sector entities who deal with OPIC as well as of participants in meetings of OPIC's Board, that a judge could later hold that matters either given or spoken with the understanding that they be treated in confidence were not entitled to such protection. Such a concern, particularly among OPIC's private Directors, and among the private companies with which OPIC deals, will inevitably result in less than a full and free exchange of ideas, and could materially undermine the Congressional mandate that OPIC achieve greater private participation in its programs.

Sincerely yours,

GERALD D. MORGAN, Jr.,
Vice President and General Counsel.

U.S. Civil Service Commission,
Washington, D.C., April 5, 1976.

Hon. Peter W. Rodino, Jr.,
Chairman, Committee on the Judiciary, House of Representatives, Washington, D.C.

Dear Mr. Chairman: The Civil Service Commission is herewith submitting a voluntary report on H.R. 11656, a bill "To provide that meetings of Government agencies shall be open to the public, and for other purposes," cited as the "Government in the Sunshine Act."

The Commission submitted a similar report to the Subcommittee on Administrative Law and Government Relations but we understood that the Subcommittee was not able to reach the Commission's proposed amendment to the bill. We accordingly again urge amendment to H.R. 11656 based on the considerations stated herein.

Unlike certain other central agencies designed to service the Federal Government, such as the General Services Administration, the Commission is a three-member body. But, unlike most such multi-headed Commissions, the Civil Service Commission does not regulate any segment of the economy affecting the general public. The Commission's primary mission is to provide leadership and regulatory direction to the central personnel programs of the executive branch.

The drafters and sponsors of H.R. 11656 recognized that agency internal personnel matters are not of direct interest to the general public and have no direct impact on the public sector. Therefore, they provided an exemption in the bill from the public meeting requirements. The Commission strongly supports this exemption, but urges that it be modified to apply not just to individual agency personnel programs but also to inter-agency personnel programs administered by the Civil Service Commission. Just as the separate parts are now exempt—so, too, should be the whole.

The exemption should be extended to Government-wide personnel rules and practices to meet the need of the Commission to continue to carry out its internal Governmental personnel management responsibilities as efficiently and effectively as possible. In addition, the Commission's meetings concerning Government-wide policies and programs in labor-management relations as well as agency labor-management relations should be included in this exemption. We do not believe that the decision-making process in regard to agency and Government-wide labor-management relations strategy and negotiation considerations should be exposed to public view and particularly the view of those with whom we will be negotiating. The Commission and other agencies could hardly adopt flexible negotiating positions when the fall-back positions and strategies have been discussed and decide in public sessions attended by both parties to the negotiations.

Accordingly, we respectfully urge that the exemption to open meetings in proposed section 552b(c)(2) of title 5, United States Code, in H.R. 11656 be amended to read as follows: "(2) relate to the internal personnel rules and practices or labor-management relations policy of an agency or to Government-wide personnel rules and practices or to Government-wide labor-management relations policy;"

By direction of the Commission:

Sincerely yours,

Robert E. Hampton,
Chairman.

ADDITIONAL VIEWS OF HON. CARLOS J. MOORHEAD AND HON. THOMAS N. KINDNESS (CONCURRED IN BY HON. EDWARD HUTCHINSON, HON. HENRY J. HYDE, HON. HAMILTON FISH, JR., AND HON. WILLIAM S. COHEN)

Introduction

We fully support the principle that governmental decisionmaking should be as open to public scrutiny as is Constitutionally and practically possible. An informed public is an essential element in assuring the effectiveness and viability of the American system of government.

We have no quarrel with the stated purpose of the "Government in the Sunshine Act". Furthermore, we are greatly encouraged by the changes made in H.R. 11656 by the Subcommittee on Administrative Law and Governmental Relations, as agreed to by the full Committee on the Judiciary. As amended, this legislation is less ambiguous less likely to produce extensive litigation, and less likely to impose unrealistic and unfair burdens on the ability of government agencies to perform the functions for which they were created. There still remains, however, considerable room for improvement.

THE DEFINITION OF AGENCY

The definition of "agency" should be made more specific. In defining "agency" in subsection (a)(1) of section 3, the bill relies, first, upon the definition of "agency" as it is found in the amended Freedom of Information Act, 5 U.S.C. 552(e). The FOIA definition, in turn, is based largely on the definition of 'agency' as it is contained in the Administrative Procedure Act, 5 U.S.C. 551(a). Then subsection (a)(1) makes the additional qualification that it extends only to those Federal agencies headed by "collegial bodies composed of two or more members, a majority of whom are appointed to such position by the President with the advice and consent of the Senate." Panels, Regional Boards, and other subdivisions authorized to act on behalf of an agency are also intended to be covered by this definition.

Administration witnesses appearing before our Committee argued that the definition of "agency", as it now stands, is unclear in its scope and can only result in extensive litigation. In testimony before our Committee, Deputy Attorney General Tyler noted that recent cases reflect a confusion about the scope of the definition of "agency", both in the APA and the FOIA. See: *Renegotiation Board* v. *Grumman Aircraft*, 421 U.S. 168, 187–8 (1975); *Soucie* v. *David*, 448 F. 2d 1067, 1075 (D.C. Cir., 1971); *Washington Research Project, Inc.*, v. *H.E.W.*, 504 F.2d 238, 245–8 (D.C. Cir., 1974). These decisions suggest that administrative entities may be "agencies" for some but not

all purposes, depending on the particular function they're performing in a particular instance.

A listing of those agencies which Congress specifically intends to cover by this legislation seems to us to be an exact and logical manner in which to proceed. The inclusion of such a list, as an alternative to a generalized definition, would avoid any confusion as to which agencies are covered and would minimize litigation. Such an approach was taken in the Government Corporation Act of 1945, 31 U.S.C. 841 et. seq., where there was a similar problem of entities not easily defined in one statutory phrase.

THE DEFINITION OF MEETING

The definition of 'meeting' in subsection (a)(2) is another problem area. We are particularly concerned about the language inserted by the full Judiciary Committee, which is troublesome for two reasons. First, the new definition does not contain the "purpose" test agreed to by the Administrative Law Subcomittee. So, instead of reading "a gathering to jointly conduct or dispose of agency business . . .", the definition now reads: "an assembly or simultaneous communication concerning the joint conduct or disposition of agency business . . ." The new language leaves open the possibility that this Act could apply to casual or social encounters, where agency business might be discussed. It also could apply to a situation where one agency member gives a speech concerning agency business with other agency members present in the audience.

Second, this new definition also extends to "simultaneous communication(s)" of agency members. This is an obvious attempt to bring conference telephone calls within the ambit of the definition. That intention had previously been rejected in Subcommittee. How, one may ask, can a telephone conversation be viewed as a public meeting? 'Meeting', within the terms of the Sunshine legislation should be limited to an actual "gathering" of agency members in a single, physical location for the sole purpose of conducting official agency business.

EXEMPTION PROCEDURES

Subsection (d)(1) requires a majority vote of the entire membership of the agency for any meeting to be closed pursuant to the exemptions listed in subsection (c)(1)–(10). In many cases, regulatory agencies are permitted by statute to adopt procedures by which sub-groups or panels can be delegated the responsibility to take action on behalf of the entire agency. See, for example, the Communications Act Amendments of 1952. 47 U.S.C. § 155(d). Why then, if a subdivision can act on behalf of an agency in substantive, policy matters, shouldn't it also be able to close meetings? The provision elevates procedure to a position of greater importance than the substantive, policy deliberations for which the meetings are to be held. As the bill is now written, a majority of the entire agency board or commission would have to convene to close the meetings of such panels or subdiviisons. We support the deletion of the phrase "a majority of the entire membership of" from subsection (d)(1) of the bill.

JUDICIAL REVIEW

We are also deeply concerned about granting "any person" the right to sue to enforce the provisions of the Sunshine Act. Subsection (h) permits any individual, irrespective of the usual standing requirements, to bring an action in a U.S. District Court to enjoin or remedy violations of any of the substantive provisions of the Act. There is serious question whether or not by doing away with normal Federal court standing requirements, that H.R. 11656 violates the "case and controversy" requirements of Article 3 of the Constitution. Furthermore, the encouragement of litigation on such a broad scale can only serve to seriously interfere with the efficient administration of government. Subsection (h) should be amended so as to require that a plaintiff makes some showing of specific harm to his interests.

Subsection (h) also contains a provision requiring that the defendant (the government) must serve his answer to a complaint within 20 days (an additional 20 days may be allowed by the court on a showing of "good cause"), instead of the 60 days normally allowed. This accelerated answer provision has its origins in the Senate bill (S. 5). However, the Senate version also required that, before instituting a suit, the plaintiff must first notify the agency and give it a reasonable time (up to ten days) to rectify the violation. No comparable notification requirement is present in the House bill. There can be no question but that a notice provision would alleviate the volume of litigation encouraged by this Act. If the accelerated answer provision is to remain in H.R. 11656, then the notification requirement present in the Senate bill should also be included in this legislation as a matter of fundamental fairness.

SUMMARY

Again, we support the purposes of H.R. 11656, but still retain serious reservations about the advisability and practicality of certain of its key provisions. We retain the hope that further improvements can be made, when this legislation is considered on the House Floor.

CARLOS J. MOORHEAD.
THOMAS N. KINDNESS.
HENRY J. HYDE.
EDWARD HUTCHINSON.
HAMILTON FISH.
WILLIAM S. COHEN.

SUPPLEMENTAL VIEWS OF HON. EDWARD HUTCHINSON AND HON. ROBERT McCLORY (CONCURRED IN BY HON. THOMAS N. KINDNESS, HON. HENRY J. HYDE, AND HON. JOHN M. ASHBROOK)

We are deeply concerned about the scope of the verbatim transcript requirement found in subsection (f)(1) of H.R. 11656. Implicit in this provision is the ill-founded belief that the public somehow has an inherent right to know everything about governmental deliberations, no matter what their content or the potential harm of public disclosure.

The American people certainly have legitimate interest in knowing how governmental decisions are made. However, this "right to know" has never been and cannot be viewed as an absolute. It must be modified, for example, by such competing interests as: (1) the national security; (2) Constitutional right of personal privacy; (3) the need for economic stability and security and (4) law enforcement effectiveness and efficiency. This legislation requires that all agencies which come under the scope of the Sunshine bill make a complete transcript or electronic recording of all of their proceedings. This requirement would extend even to those meetings, validly closed pursuant to the exemptions noted in subsection (c)(1–10). So, for example, a complete record must exist for all closed meetings of the Federal Reserve Board and Securities and Exchange Commission, no matter how sensitive the content or how damaging unwarranted disclosure could be.

First, we object to the imposition of an across-the-board transcript and electronic recording requirement. We object because of the very practical and real possibility that privileged subject matter could easily be leaked. Second, as written, this provision leaves the decision regarding disclosure of the complete transcript of a closed meeting solely up to the agencies in question. This discretion leaves room for arbitrary and tyrannical disregard of individual rights by a majority vote in a bureaucracy.

There are practical objections as well. Since the provision clearly leaves open the possibility of subsequent disclosure of a complete transcript of a closed meeting, the likelihood is that the free exchange of ideas between agency members about sensitive policy matters will be greatly hampered. This requirement can only be viewed as potentially impairing the decision-making processes of government.

Proponents argue that a complete transcript of closed meetings must be retained by the agency so that it will be available for an "in camera" review of a judge, should litigation of the appropriateness or contents of a closed meeting develop. Discovery procedures available in Federal courts have never depended upon the availability of verbatim transcripts or electronic recordings of agency meetings. Furthermore, this attitude is evidence of Congress once again dele-

gating to the courts the power to make a decision on a policy question that is properly within our prerogatives.

We strongly feel that Congress would be ill-advised to pass H.R. 11656 containing this damaging transcript requirement. The desperate attempt to appear "open" at all costs, can only result in the diminution of the rights and expectations of the citizens we seek to serve.

EDWARD HUTCHINSON.
ROBERT MCCLORY.
THOMAS N. KINDNESS.
HENRY J. HYDE.
JOHN A. ASHBROOK.

SUPPLEMENTAL VIEWS OF HON. EDWARD MEZVINSKY, HON. JOHN SEIBERLING

We think that this is an excellent bill, though we regret certain weakening amendments made by the Administrative Law and Governmental Relations Subcommittee and adopted by the full Judiciary Committee. We believe that one such change is of particular importance, and it is to this change that our supplemental views are specifically addressed.

The bill, as originally considered by the Committee on Government Operations and its Government Operations and Individual Rights Subcommittee, required that when a deletion of exempt material was made from a meeting transcript, the agency was to explain the reason and statutory authority for the deletion and provide a summary or paraphrase of the deleted material. The Government Information and Individual Rights Subcommittee, in a compromise move, dropped the requirement of a summary or paraphrase, leaving only the requirement that a statement of the reason and the statutory basis for the deletion be set forth.

Our Subcommittee on Administration Law and Governmental Relations further amended the bill by dropping even the requirement for a statement of the reason and statutory authority for the deletion, and the full Judiciary Committee concurred in this amendment. The effect of this change is to leave only a blank space where material is deleted, providing not even a hint of what has been removed, or by what authority.

This would leave a citizen interested in what had occurred at a meeting entirely in the dark about what has been deleted. To provide the reason and the applicable statute would impose no significant burden upon the administrative agency, while supplying—as is generally required with respect to agency decisions—the reason for the agency action. We note that a similar explanation is required under the Federal Advisory Committee Act. The absence of even this simple explanation is likely to generate unnecessary litigation from citizens who do not know the reason for the deletion, thus wasting the taxpayers' time and money in defending needless actions.

We believe that the people's right to know, as expressed in this legislation, includes the right to be given the reason why they are prevented from having information about agency action. We believe that the compromise version of this provision that was adopted by the Committee on Government Operations properly balanced the right to know against the need to keep certain matters secret and urge that the compromise language be reinstated.

EDWARD MEZVINSKY.
JOHN SEIBERLING.

SUPPLEMENTAL VIEWS OF HON. BOB KASTENMEIER

We think that this is an excellent bill, though we regret certain weakening amendments made by the Administrative Law and Governmental Relations Subcommittee and adopted by the full Judiciary Committee. We believe that one such change is of particular importance, and it is to this change that our supplemental views are specifically addressed.

The bill, as originally considered by the Committee on Government Operations and its Government Operations and Individual Rights Subcommittee, required that when a deletion of exempt material was made from a meeting transcript, the agency was to explain the reason and statutory authority for the deletion and provide a summary or paraphrase of the deleted material. The Government Information and Individual Rights Subcommittee, in a compromise move, dropped the requirement of a summary or paraphrase, leaving only the requirement that a statement of the reason and the statutory basis for the deletion be set forth.

Our Subcommittee on Administrative Law and Governmental Relations further amended the bill by dropping even the requirement for a statement of the reason and statutory authority for the deletion, and the full Judiciary Committee concurred in this amendment. The effect of this change is to leave only a blank space where material is deleted, providing not even a hint of what has been removed, or by what authority.

This would leave a citizen interested in what had occurred at a meeting entirely in the dark about what has been deleted. To provide the reason and the applicable statute would impose no significant burden upon the administrative agency, while supplying—as is generally required with respect to agency decisions—the reason for the agency action. We note that a similar explanation is required under the Federal Advisory Committee Act. The absence of even this simple explanation is likely to generate unnecessary litigation from citizens who do not know the reason for the deletion, thus wasting the taxpayers' time and money in defending needless actions.

We believe that the people's right to know, as expressed in this legislation, includes the right to be given the reason why they are prevented from having information about agency action. We believe that the compromise version of this provision that was adopted by the Committee on Government Operations properly balanced the right to know against the need to keep certain matters secret and urge that the compromise language be reinstated.

BOB KASTENMEIER.

SUPPLEMENTAL VIEWS OF HON. JACK BROOKS AND HON. ELIZABETH HOLTZMAN

We think that this is an excellent bill, though we regret certain weakening amendments made by the Administrative Law and Governmental Relations Subcommittee and adopted by the full Judiciary Committee. We believe that one such change is of particular importance, and it is to this change that our supplemental views are specifically addressed.

The bill, as originally considered by the Committee on Government Operations and its Government Operations and Individual Rights Subcommittee, required that when a deletion of exempt material was made from a meeting transcript, the agency was to explain the reason and statutory authority for the deletion and provide a summary or paraphrase of the deleted material. The Government Information and Individual Rights Subcommittee, in a compromise move, dropped the requirement of a summary or paraphase, leaving only the requirement that a statement of the reason and the statutory basis for the deletion be set forth.

Our Subcommittee on Administrative Law and Governmental Relations further amended the bill by dropping even the requirement for a statement of the reason and statutory authority for the deletion, and the full Judiciary Committee concurred in this amendment. The effect of this change is to leave only a blank space where material is deleted, providing not even a hint of what has been removed, or by what authority.

This would leave a citizen interested in what had occurred at a meeting entirely in the dark about what has been deleted. To provide the reason and the applicable statute would impose no significant burden upon the administrative agency, while supplying—as is generally required with respect to agency decisions—the reason for the agency action. We note that a similar explanation is required under the Federal Advisory Committee Act. The absence of even this simple explanation is required under the Federal Advisory Committee Act. The absence of even this simple explanation is likely to generate unnecessary litigation from citizens who do not know the reason for the deletion, thus wasting the taxpayers' time and money in defending needless actions.

We believe that the people's right to know, as expressed in this legislation, includes the right to be given the reason why they are prevented from having information about agency action. We believe that the compromise version of this provision that was adopted by the Committee on Government Operations properly balanced the right to know against the need to keep certain matters secret and urge that the compromise language be reinstated.

JACK BROOKS.
ELIZABETH HOLTZMAN II.

80-459 O - 77 - 39

SUPPLEMENTAL VIEWS OF HON. JOHN CONYERS

We think that this is an excellent bill, though we regret certain weakening amendments made by the Administrative Law and Governmental Relations Subcommittee and adopted by the full Judiciary Committee. We believe that one such change is of particular importance, and it is to this change that our supplemental views are specifically addressed.

The bill, as originally considered by the Committee on Government Operations and its Government Operations and Individual Rights Subcommittee, required that when a deletion of exempt material was made from a meeting transcript, the agency was to explain the reason and statutory authority for the deletion and provide a summary or paraphrase of the deleted material. The Government Information and Individual Rights Subcommittee, in a compromise move, dropped the requirement of a summary or paraphrase, leaving only the requirement that a statement of the reason and the statutory basis for the deletion be set forth.

Our Subcommittee on Administrative Law and Governmental Relations further amended the bill by dropping even the requirement for a statement of the reason and statutory authority for the deletion, and the full Judiciary Committee concurred in this amendment. The effect of this change is to leave only a blank space where material is deleted, providing not even a hint of what has been removed, or by what authority.

This would leave a citizen interested in what had occurred at a meeting entirely in the dark about what has been deleted. To provide the reason and the applicable statute would impose no significant burden upon the administrative agency, while supplying—as is generally required with respect to agency decisions—the reason for the agency action. We note that a similar explanation is required under the Federal Advisory Committee Act. The absence of even this simple explanation is likely to generate unnecessary litigation from citizens who do not know the reason for the deletion, thus wasting the taxpayers' time and money in defending needless actions.

We believe that the people's right to know, as expressed in this legislation, includes the right to be given the reason why they are prevented from having information about agency action. We believe that the compromise version of this provision that was adopted by the Committee on Government Operations properly balanced the right to know against the need to keep certain matters secret and urge that the compromise language be reinstated.

JOHN CONYERS.

[From the Congressional Record—House, July 28, 1976]

(H 7863–H 7902)

Providing for Consideration of H.R. 11656, Government in The Sunshine Act

Mr. Pepper. Mr. Speaker, by direction of the Committee on Rules, I call up House Resolution 1207 and ask for its immediate consideration.

The Clerk read the resolution, as follows:

H. Res. 1207

Resolved, That upon the adoption of this resolution it shall be in order to move that the House resolve itself into the Committee of the Whole House on the State of the Union for the consideration of the bill (H.R. 11656) to provide that meetings of Government agencies shall be open to the public, and for other purposes. After general debate, which shall be confined to the bill and shall continue not to exceed two hours, one hour to be equally divided and controlled by the chairman and ranking minority member of the Committee on Government Operations and one hour to be equally divided and controlled by the chairman and ranking minority member of the Committee on the Judiciary, the bill shall be read for amendment under the five-minute rule. At the conclusion of the consideration of the bill for amendment, the Committee shall rise and report the bill to the House with such amendments as may have been adopted, and the previous question shall be considered as ordered on the bill and amendments thereto to final passage without intervening motion except one motion to recommit with or without instructions. After the passage of H.R. 11656, the Committee on Government Operations shall be discharged from the further consideration of the bill S. 5, and it shall then be in order in the House to move to strike out all after the enacting clause of the said Senate bill and insert in lieu thereof the text of the bill H.R. 11656 as passed by the House.

The Speaker. The gentleman from Florida (Mr. Pepper) is recognized for 1 hour.

Mr. Pepper. Mr. Speaker, I yield 30 minutes to the able gentleman from Ohio (Mr. Latta), pending which I yield myself such time as I may consume.

Mr. Speaker, House Resolution 1207 provides for consideration of H.R. 11656, Government in the Sunshine Act, which would require that meetings of Federal regulatory and other agencies be open to the public, that transcripts be made of closed meetings and released, minus deletion of subjects exempt from disclosure under the provisions of the bill, and which would provide judicial review for challenges of improper closing of meetings, among other provisions.

This is an open rule, providing 2 hours of general debate: 1 hour controlled by the chairman and ranking minority member of the Government Operations Committee and 1 hour controlled by the chairman and ranking minority member of the Judiciary Committee. The bill is to be read for amendment under the 5-minute rule.

The rule further provides that upon passage of H.R. 11656, the Committee on Government Operations shall be discharged from further

consideration of S. 5. It then shall be in order to strike all after the enacting clause of S. 5 and to insert in lieu thereof the provisions contained in H.R. 11656 as passed by the House.

The legislation requires that most meetings of independent Federal agencies be open to the public. It applies to agencies covered by the Freedom of Information Act, as well as to the Federal Election Commission, Postal Service, and to organizations headed by two or more members, a majority of whom are appointed by the President with Senate confirmation. Ten specific exemptions, which generally parallel those in the Freedom of Information Act, are provided. The exemptions secure a balance against the right to know and competing values such as the national security or foreign policy, individual privacy rights, and economic stability.

Ex parte communications between agency officials and outsiders affected by pending agency business are prohibited. The bill's ex parte provision stems from a 2-year effort to limit secret contacts with officials by lawyers, lobbyists, and others interested in agency proceedings, and it is similar to a draft proposed by the American Bar Association in 1974.

Forty-eight States have enacted some type of open meeting provisions, including my State of Florida. Mr. Speaker, I believe Florida is one of the pioneers in this needed reform. The experience of States has dispelled concerns that open meetings inhibit free discussion or cast a distorted image on agency proceedings. Instead, open meetings have produced better debate, better reasoned decisions, increased public understanding of agency procedures, and less distrust of government.

Mr. Speaker, this legislation was considered 3 years in the Senate prior to its passage in that body last November by a vote of 94 to 0. Since 1973, most House committee meetings have been open to the public, and recently most Senate committees meetings and House-Senate conferences have been opened. The bill extends this Federal policy into independent Federal agencies. The public has a right to full disclosure of Government decisionmaking processes insofar as the extension of sunshine is consistent with the privacy and the protection of other rights provided for in the bill.

Mr. Speaker, I shall support one amendment to this bill to be offered by the gentleman from New York (Mr. HORTON).

Mr. Speaker, I believe this is a meaningful milestone in the protection of our democracy, and I hope that this bill will be enacted with, as I said, the amendment that I hope will be adopted by this House. Mr. Speaker, I therefore urge the adoption of House Resolution 1207 so that we may proceed to the consideration of H.R. 11656.

Mr. LATTA. Mr. Speaker, I yield myself such time as I may consume.

(Mr. LATTA asked and was given permission to revise and extend his remarks.)

Mr. LATTA. Mr. Speaker, I would like to point out something in this bill to the Members of the House which I think should be clarified—and I have heard no mention that this matter will be clarified—as it affects every Member of this House and his constituency.

We do some foolish things around here in the interest of reform and sunshine and true happiness without ever thinking about what the end result might be.

Mr. Speaker, let me give the Members an example. Some time back we passed a piece of legislation—and I am not going to name it—and we found out later that before we could contact an agency in behalf of one of our constituents, we had to have a written authorization.

Remember that? I will venture to say that not one-tenth of the membership of this House knew that that requirement was in that legislation when it passed this body.

Mr. Speaker, when a Member has an emergency situation in his district and a constituent contacts him about that emergency situation, when the Member has to have a written authorization to contact that agency about that emergency, I think that is absolutely wrong.

Mr. Speaker, we never intended to require such a thing, but it is in the law; and we now have to follow it. As a result, a Member cannot serve his constituency in an expeditious manner in all cases.

Mr. Speaker, Members are sent here to serve not only the United States of America but their constituency.

Let me refer to something in this legislation which I pointed out when the matter was before the Committee on Rules, and I have reference to ex parte communications. Each one of us, as Members of Congress, will be affected by this legislation if it passes in its present form. How will we be affected?

Let us turn to page 17, at the top of the page, and I am not going to read the entire section because I do not want to burden you with this, but unless something is done about it, our malfesance is going to come home to roost real fast if this legislation is enacted as written:

> . . . a communication prohibited by this subsection shall place on the public record of the proceeding:
>
> "(i) all such written communications;
>
> "(ii) memoranda stating the substance of all such oral communications; and
>
> "(iii) all written responses, and memoranda stating the substance of all oral responses, to the materials described in clauses (i) and (ii) of this subparagraph;

Et cetera, et cetera.

What are they talking about? You call up an agency of the Government, to make an inquiry, as you will be doing, assuming this legislation goes on the books as written, that communication will be ex parte and will be a part of the public record for the world to see. That call will concern your constituent's business, not the world's.

Now is that what we want? Is that what our constituents want when he or she contacts us about a personal problem they have with an agency of this Government? I do not think so. I repeat, I do not think so. But there is no privilege, no privilege, written into this legislation to cover that situation.

I say to my colleagues I believe such matters should be privileged communications. When a constitutent contacts you about a tax problem, it is his problem with the Government, and vice versa. Should that communication go on the public record and be open for the world to see? I think not. I think not.

But the way this legislation is before us today, and I have heard of no effort being made to change it, it will go on the public record.

My friends, this is our unwanted provision in this legislation and it affects your constituency and mine.

I talked to some of the leadership about this when the matter was before the Committee on Rules and they did not know our activities

in behalf of constituents would be covered. So I think it should be corrected. We are all for sunshine, let the sun come in, let these agencies open up their hearings. But when you contact them about a constituent's personal matter, I do not think it ought to go on the public record. Hopefully this House will adopt an amendment during the 5-minute rule which will provide the privilege that the constituent is entitled in these matters.

Mr. PEPPER. Does the gentleman from Ohio have further requests for time?

Mr. LATTA. Mr. Speaker, I yield 1 minute to the gentleman from California (Mr. GOLDWATER).

Mr. GOLDWATER. Mr. Speaker, I thank the gentleman for yielding.

Mr. Speaker, I understood the gentleman from Ohio to say that his concern about the bill was that any communications between an agency of the Government and an individual that are on private matters would be open to public exposure?

Mr. LATTA. That is a possibility under the language as written.

Mr. GOLDWATER. In talking to the leadership and the committee when this came before the Committee on Rules, did they indicate a concern about this and that they are going to make an effort to change that provision?

Mr. LATTA. Mr. Speaker, because I believe that this is a very, very important matter, one that affects every Member of this House and his constituency, and because the gentleman from California (Mr. GOLDWATER) has asked a very important question, I would ask the gentleman to again repeat his question.

Mr. GOLDWATER. I was surprised, and I was wondering if in questioning the individuals, the chairmen of the committees that wrote this law indicated a concern for this apparent violation of privacy. Then they indicate that they are going to examine this and perhaps offer amendments on the floor; is that correct?

Mr. LATTA. In answer to the gentleman, I have, as I indicated, no knowledge at this very moment that an amendment will be offered to correct the language to which I object. I am hopeful than an amendment will be offered. There has been a very feeble effort made in this direction in this legislation, but it does not reach the point that I raise. It says this section does not constitute authority to withholding information from the Congress, and that does not cover the point of my objection.

We have had two committees studying this. Hopefully one of these committees will come forward during the 5-minute rule with an amendment to protect your right to make an inquiry for a constituent.

Mr. FASCELL. Mr. Speaker, will the gentleman yield?

Mr. GOLDWATER. I yield to the gentleman from Florida.

Mr. FASCELL. I thank the gentleman for yielding.

Of course, the bill does not apply to personal matters at all but to ex parte communications regarding quasi-judicial proceedings. One would not go to a judge and try to twist his arm in the middle of a lawsuit. It is unethical; it is improper. The bill says that we are talking about persons outside of the agency who are contacting people in a "proceeding." We are talking about something in the nature of an adversary proceeding or a quasi-judicial proceeding. We are talking about contracting a person who would be involved in a decisionmaking process. We are not talking about agency staff or personal matters.

We are talking about going to somebody who is in the process of making a decision on a pending case. All we are saying there is, "If you want to do that, fine, just spread it on the record." That is all. This is so that all the other parties will know from where they are getting hit with political influence. That is all we are saying.

Let me add that this is the section which practically codifies existing regulations in almost all of the agencies and it is also the law which the American Bar Association has advocated for many years. It does not set a new precedent. It does nothing frightening. It does not interfere with the constitutional process, or personal privilege. It does not unduly hamper a Member of Congress from doing what he is supposed to do. If one wants to take a position on an adversary proceeding, just go down and put his letter on record and say what his position is. That is all it says.

Mr. GOLDWATER. What the gentleman is saying is that if I as a Representative intervene on behalf of my constituent, as the gentleman from Ohio (Mr. LATTA) pointed out, in a tax matter between him and the agency, would that communication be spread upon the record?

Mr. FASCELL. No; not unless the agency decides to do it. That situation is not even covered under this bill.

Ms. ABZUG. Mr. Speaker, will the gentleman yield?

Mr. GOLDWATER. I yield to the gentlewoman from New York.

Ms. ABZUG. I thank the gentleman for yielding.

I think there is a certain amount of confusion injected here. The situation that the gentleman from California described is not involved here. What we are talking about in this section of the law concerning ex parte communications involves adjudicatory proceedings and rulemaking proceedings, not the normal inquiry that the office of a Congressman would make with respect to information.

Mr. LATTA. Mr. Speaker, if the gentleman will yield, I just wish I could be as sure as the gentleman from New York or the gentleman from Florida. I have read this bill and I am not convinced. We have to look at the language of the bill and read what it says. The language says:

> . . . "ex parte communication" means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given.

I say if the sponsors of this legislation fully intended that it exempt Members of Congress in their proper communications with the agencies of Government, then let them prepare an amendment, have it submitted and agreed to by this House, to protect the right of the Members to contact the agencies and departments of the Government in the interests of their constituents without having it spread on the public record.

Mr. PEPPER. Mr. Speaker, I move the previous question on the resolution.

The previous question was ordered.

The SPEAKER. The question is on the resolution.

The question was taken; and the Speaker announced that the ayes appeared to have it.

Mr. BROWN of Michigan. Mr. Speaker, I object to the vote on the ground that a quorum is not present and make the point of order that a quorum is not present.

The SPEAKER. Evidently a quorum is not present.

The Sergeant at Arms will notify absent Members.

The vote was taken by electronic device, and there were—yeas 391, nays 0, not voting 41, as follows:

[Roll No. 558]

YEAS—391

Abdnor
Abzug
Adams
Addabbo
Alexander
Allen
Ambro
Anderson, Calif.
Anderson, Ill.
Andrews, N.C.
Andrews, N. Dak.
Annunzio
Archer
Armstrong
Ashbrook
Ashley
Aspin
AuCoin
Badillo
Bafalis
Baldus
Baucus
Bauman
Beard, R.I.
Beard, Tenn.
Bedell
Bell
Bennett
Bergland
Bevill
Biester
Bingham
Blanchard
Blouin
Boggs
Boland
Bolling
Bonker
Bowen
Brademas
Breaux
Breckinridge
Brinkley
Brodhead
Brooks
Broomfield
Brown, Calif.
Brown, Mich.
Brown, Ohio
Broyhill
Buchanan
Burgener
Burke, Calif.
Burke, Fla.
Burke, Mass.
Burleson, Tex.
Burlison, Mo.
Burton, Phillip
Butler
Byron
Carr
Carter
Cederberg
Chappell
Chisholm
Clancy
Clausen, Don H.
Clawson, Del.
Cleveland
Cochran
Cohen
Collins, Ill.
Collins, Tex.
Conable
Conlan
Conte
Conyers
Corman
Cornell
Cotter
Coughlin
Crane
D'Amours
Daniel, Dan
Daniel, R. W.
Daniels, N.J.
Danielson
Davis
de la Garza
Delaney
Dellums
Derrick
Derwinski
Devine
Dickinson
Diggs
Dingell
Dodd
Downey, N.Y.
Downing, Va.
Drinan
Duncan, Oreg.
Duncan, Tenn.
du Pont
Early
Eckhardt
Edgar
Edwards, Ala.
Edwards, Calif.
Eilberg
Emery
English
Erlenborn
Eshleman
Evans, Colo.
Evans, Ind.
Evins, Tenn.
Fary
Fascell
Findley
Fish
Fisher
Fithian
Flood
Florio
Flowers
Flynt
Foley
Ford, Mich.
Ford, Tenn.
Forsythe
Fraser
Frenzel
Frey
Fuqua
Giaimo
Gibbons
Gilman
Ginn
Goldwater
Gonzalez
Goodling
Gradison
Grassley
Green
Gude
Guyer
Hagedorn
Haley
Hall, Ill.
Hall, Tex.
Hamilton
Hammerschmidt
Hanley
Hannaford
Harkin
Harrington
Harris
Harsha
Hawkins
Hayes, Ind.
Hays, Ohio
Hefner
Heinz
Hicks
Hightower
Hillis
Holland
Holt
Holtzman
Horton
Howard
Howe
Hubbard

Hughes
Hungate
Hutchinson
Hyde
Ichord
Jacobs
Jarman
Jeffords
Jenrette
Johnson, Calif.
Johnson, Colo.
Johnson, Pa.
Jones, Ala.
Jones, N.C.
Jones, Okla.
Jordan
Karth
Kasten
Kastenmeier
Kazen
Kemp
Ketchum
Keys
Kindness
Koch
Krebs
Krueger
LaFalce
Lagomarsino
Latta
Leggett
Lehman
Lent
Levitas
Lloyd, Calif.
Lloyd, Tenn.
Long, La.
Long, Md.
Lott
Lujan
McClory
McCloskey
McCollister
McCormack
McDade
McDonald
McEwen
McFall
McHugh
McKay
McKinney
Madden
Madigan
Maguire
Mahon
Mann
Martin
Matsunaga
Mazzoli
Meeds
Melcher
Metcalfe
Meyner
Mezvinsky
Michel
Mikva
Milford
Miller, Calif.
Miller, Ohio
Mills
Mineta
Minish
Mink
Mitchell, Md.
Mitchell, N.Y.
Moakley
Moffett
Mollohan
Montgomery
Moore
Moorhead, Calif.
Moorhead, Pa.
Morgan
Mosher
Moss
Mottl
Murphy, Ill.
Murphy, N.Y.
Murtha
Myers, Ind.
Myers, Pa.
Natcher
Neal
Nedzi
Nichols
Nix
Nolan
Nowak
Oberstar
Obey
O'Brien
Ottinger
Passman
Patten, N.J.
Patterson, Calif.
Pattison, N.Y.
Paul
Pepper
Perkins
Pettis
Pickle
Pike
Poage
Pressler
Preyer
Price
Pritchard
Quie
Quillen
Railsback
Randall
Rangel
Reuss
Richmond
Rinaldo
Risenhoover
Roberts
Robinson
Rodino
Rogers
Roncalio
Rooney
Rose
Rosenthal
Roush
Rousselot
Roybal
Runnels
Ruppe
Russo
Ryan
St Germain
Santini
Sarasin
Sarbanes
Satterfield
Scheuer
Schneebeli
Schroeder
Schulze
Sebelius
Seiberling
Sharp
Shipley
Shriver
Shuster
Sikes
Simon
Slack
Smith, Iowa
Smith, Nebr.
Snyder
Solarz
Spellman
Spence
Staggers
Stanton, J. William
Stanton, James V.
Stark
Steed
Steelman
Steiger, Wis.
Stokes
Studds
Symms
Talcott
Taylor, Mo.
Taylor, N.C.
Teague
Thompson
Thone
Thornton
Traxler
Treen
Tsongas
Udall
Ullman
Van Deerlin
Vander Jagt
Vander Veen
Vanik
Vigorito
Waggonner
Walsh
Waxman
Weaver
Whalen
White
Whitehurst
Whitten
Wilson, Bob
Wilson, C. H.
Winn
Wirth

Wolff	Yates	Young, Tex.
Wright	Yatron	Zablocki
Wydler	Young, Alaska	Zeferetti
Wylie	Young, Fla.	

NAYS—0

NOT VOTING—41

Biaggi	Jones, Tenn.	Rostenkowski
Burton, John	Kelly	Sisk
Carney	Landrum	Skubitz
Clay	Litton	Steiger, Ariz.
Dent	Lundine	Stephens
Esch	Mathis	Stratton
Fenwick	O'Hara	Stuckey
Fountain	O'Neill	Sullivan
Gaydos	Peyser	Symington
Hansen	Rees	Wampler
Hébert	Regula	Wiggins
Helstoski	Rhodes	Wilson, Tex.
Henderson	Riegle	Young, Ga.
Hinshaw	Roe	

The Clerk announced the following pairs:
Mr. O'Neill with Mr. Landrum.
Mr. Dent with Mr. Stuckey.
Mr. Lundine with Mr. Clay.
Mr. Rostenkowski with Mr. O'Hara.
Mr. Sisk with Mr. Riegle.
Mr. Fountain with Mr. Esch.
Mr. Stratton with Mrs. Fenwick.
Mr. Helstoski with Mr. Hansen.
Mr. Jones of Tennessee with Mr. Hébert.
Mr. Symington with Mr. Kelly.
Mr. Biaggi with Mr. Rees.
Mr. John Burton with Mr. Henderson.
Mr. Carney with Mr. Regula.
Mr. Gaydos with Mr. Mathis.
Mr. Roe with Mr. Peyser.
Mr. Stephens with Mr. Steiger of Arizona.
Mrs. Sullivan with Mr. Skubitz.
Mr. Young of Georgia with Mr. Wampler.
Mr. Charles Wilson of Texas with Mr. Wiggins.

So the resolution was agreed to.
The result of the vote was announced as above recorded.
A motion to reconsider was laid on the table.

* * * * * * *

Government in the Sunshine Act

Ms. Abzug. Mr. Speaker, I move that the House resolve itself into the Committee of the Whole House on the State of the Union for the consideration of the bill (H.R. 11656)* to provide that meetings of Government agencies shall be open to the public, and for other purposes.

The Speaker. The question is on the motion offered by the gentlewoman from New York (Ms. Abzug).

The motion was agreed to.

---

*A copy of H.R. 11656 as introduced on February 3, 1976 may be found on p. 457. A copy of H.R. 11656 as reported March 8, 1976 by the House Government Operations Committee (H. Rept. 94–880, Part 1) and as reported by House Judiciary Committee April 8, 1976 (H. Rept. 94–880, Part 2) may be found on pages 475 and 493 respectively.

IN THE COMMITTEE OF THE WHOLE

Accordingly the House resolved itself into the Committee of the Whole House on the State of the Union for the consideration of the bill H.R. 11656, with Mrs. BURKE of California in the chair.

The Clerk read the title of the bill.

By unanimous consent, the first reading of the bill was dispensed with.

The CHAIRMAN. Pursuant to the rule, general debate will continue not to exceed 2 hours, 1 hour to be equally divided and controlled by the chairman and ranking minority member of the Committee on Government Operations, and 1 hour to be equally divided and controlled by the chairman and ranking minority member of the Committee on the Judiciary.

Under the rule, the gentlewoman from New York (Ms. ABZUG), the gentleman from New York (Mr. HORTON), the gentleman from Alabama (Mr. FLOWERS), and the gentleman from California (Mr. MOORHEAD) will each be recognized for 30 minutes.

The Chair recognizes the gentlewoman from New York (Ms. ABZUG).

Ms. ABZUG. Madam Chairman, I yield myself such time as I may consume.

(Ms. ABZUG asked and was given permission to revise and extend her remarks.)

Ms. ABZUG. Madam Chairman, the general purpose of H.R. 11656 is to provide that meetings of multimember Federal agencies shall be open to the public, with the exception of discussions of several specific areas. The bill also prohibits ex parte communications to and from agency decisionmaking personnel with respect to the merits of pending proceedings.

This bill is sponsored by 26 members of the Committee on Government Operations and was voted out of the committee by a vote of 32 to 7.

The Judiciary Committee, which also considered this bill, ordered it reported by voice vote: 86 Members of the House are sponsors of either this bill or a very similar version of it, and S. 5, which is also quite like H.R. 11656, passed the other body by a vote of 94 to 0 last November 6. In its present form, this measure represents a great deal of hard work on the part of the members and staff of both committees and an effort to meet all reasonable objections raised by agencies in the executive branch.

Absent special circumstances, there is no reason why the public should not have the right to observe the agency decisionmaking process firsthand. In the words of FCC Commissioner Glen O. Robinson, who testified before the Government Information and Individual Rights Subcommittee on this legislation;

> Chief among the benefits [of the legislation] is increasing public understanding of administrative decisionmaking processes. * * * I do not know whether that understanding will lead to greater confidence in administrative decisionmaking. ** * Quite possibly, it could lead to less confidence. But either of these outcomes * * * can be beneficial. If, in the light of sunshine a Government agency shows itself to be deserving of trust, then by all means it should have it: conversely, if that same sunlight reveals an agency to be inept, inefficient, and not in pursuit of the public interest, then obviously that agency does not deserve, and should not have, public trust. (Hearings on H.R. 10315 and H.R. 9668, p. 98.)

The legislation requires that when an agency closes a meeting under one of the exemptions in the bill, it must make a recording or verbatim transcript of the closed portion and release to the public any part of the recording or transcript that does not contain exempt information. A second purpose of this requirement is to assure that a citizen has a meaningful remedy when a meeting has been illegally closed, namely, the release by the court of the transcript of the illegally closed portion.

The purpose of the provisions of the bill prohibiting ex parte communications is to insure that agency decisions required to be made on a public record are not influenced by private, off-the-record communications from those personally interested in the outcome.

Summary of Major Provisions of the Legislation

I. OPEN MEETINGS

The open meeting provisions would apply to approximately 50 Federal agencies that are presently covered by the Freedom of Information Act and the Privacy Act, and are headed by a body of two or more members, a majority of whom are chosen by the President with the advice and consent of the Senate.

Meetings covered under the bill include not only sessions at which formal action is taken, but also those at which a quorum of members assembles to discuss the conduct or disposition of agency business. A chance encounter would not be a meeting within the meaning of the bill so long as no agency business is conducted or disposed of.

The bill requires that every meeting be open to the public unless it falls within one of the bill's 10 specific exemptions. In case of doubt as to whether a portion of a meeting is exempt, the presumption is to be in favor of openness. Even if a matter falls within an exemption, the discussion must be open where the public interest so requires.

No meeting may be closed unless a majority of the membership votes to take such action. Such a vote need not itself occur during a meeting and could properly be taken by circulating a written ballot or tally sheet in advance.

A copy of each vote on closing a meeting must be made available to the public whether or not the meeting or portion is closed. This will inform the public as to the full voting record of each agency member on openness questions. When a vote in the issue of closing fulfills the requirements for closing, an explanation of the action and a list of persons expected to attend the meeting must also be made public.

Agencies are required to publicly announce, at least 1 week prior to a meeting, its date, location, and other relevant information.

The keeping of a complete, verbatim transcript or electronic recording of each portion of a meeting closed to the public would be required—except for discussions dealing with adjudications or agency participation in civil actions—and any portion of each transcript or recording whose release would not have the effect set forth in one or more of the exemptions would have to be made available to the public. Under the bill as approved by the Government Operations Committee, deletions would be replaced by a written explanation of the reason and the statutory authority for each. Written minutes of open meetings will also be required to be kept and made publicly available.

Any person could challenge in court the closing of a meeting or any other violation of the openness requirements of the bill, and the burden of sustaining the closing or other action in question would be upon the agency. The court could enjoin future violations of the act or release the transcript of an improperly closed meeting.

II. EX PARTE COMMUNICATIONS

Section 4 of the bill would enact a general prohibition on ex parte communications between agency decisionmaking personnel, including commissioners and administrative law judges, and outside persons having an interest in the outcome of a pending proceeding. These provisions would apply to executive agencies without regard to whether they are headed by a collegial body or a single individual.

The communications prohibited by the ex parte section would include only those relative to the merits of the proceeding. Thus, an inquiry of an agency clerk to the procedural status of an adjudication or rulemaking matter would not be unlawful under the bill. A violation of the prohibition could result in sanctions up to and including loss of the proceeding on the merits (as under existing case law). See, for example, *Jacksonville Broadcasting Corp* v. *FCC*, 348 F. 2d 75 (D.C. Cir.), *cert. denied*, 382 U.S. 893 (1965).

SECTION-BY-SECTION ANALYSIS

Sections 1 and 2 of the bill entitle it the "Government in the Sunshine" Act and set forth a policy that the public is entitled to the fullest practicable information regarding the decisionmaking processes of the Federal Government.

Section 3 of the bill, which contains the open meeting provisions, would enact a new section 552b of title 5 of the United States Code. The new section would be composed of subsections (a) through (o), which provide as follows:

Subsection (a) contains definitions. Subsection (a)(1) defines "agency" to include any agency, as defined in the Freedom of Information Act, headed by a collegial body composed of two or more individual members, a majority of whom are appointed by the President and confirmed by the Senate, as well as any subdivision thereof authorized to act on behalf of the agency.

Subsection (a)(2) defines a "meeting" as an assembly or simultaneous communication concerning the joint conduct or disposition of agency business by two or more, but at least the number of individual agency members required to take action on behalf of the agency. A "meeting" does not include meetings held solely to take action under this section.

Subsection (a)(3) defines "member" as an individual who belongs to a collegial body heading an agency. If a majority of the members of any agency or subdivision are appointed by the President and confirmed by the Senate, then any member of the body in question is covered by the bill. For example, the Federal Open Market Committee, which sets our monetary policy, has 12 members, seven of whom are appointed by the President and confirmed by the Senate and five of whom are not. Since the FOMC is an "agency" under the legislation, all 12 individuals are "members."

Subsection (b) (1) provides that agency members shall not jointly conduct or dispose of agency business without complying with the provisions of this legislation.

Subsection (b) (2) provides that every portion of every meeting of an agency shall be open to public observation, except as provided in subsection (c). The agency must provide adequate seating space, visibility, and acoustics. The public is intended to be in the same room as the agency members.

Subsection (c) permits an agency to close a meeting and to withhold the transcript thereof where the disclosure of the information to be discussed can be reasonably expected to come within 1 of 10 exemptions. These exemptions, which roughly parallel those in the Freedom of Information Act, include—

First, material concerning the national defense.

Second, information related solely to the internal personnel rules and practices of an agency.

Third, information required or permitted to be withheld by any other statute containing particular criteria. I have been asked whether section 222 (f) of the Immigration Act, 8 U.S.C. 1202 (f), comes within this provision. I have reviewed that statute and I believe that it does qualify. The same is true as to 13 U.S.C. section 9, a part of the Census Title.

Fourth, information that would disclose trade secrets and commercial or financial material obtained from a person and privileged or confidential, as interpreted in cases such as *National Parks & Conservation Assn.* v. *Morton*, 498 F. 2d 765, 770 (D.C. Cir. 1974).

Fifth, a discussion that would involve accusing any person of a crime, or formally censuring any person.

Sixth, information of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy.

Seventh, investigatory information compiled for law enforcement purposes, if it falls into one of six specific categories listed in this paragraph.

Eighth, information contained in or relating to bank condition reports.

Ninth, information the premature disclosure of which would be likely to lead to significant financial speculation, significantly endanger the stability of any financial institution, or significantly frustrate implementation of a proposed agency action. The last part of this exemption will not apply where the content or nature of the proposed agency action has been disclosed to the public by the agency, or where the agency will be required to make such disclosure prior to taking final action on the proposal.

Tenth, discussions that specifically concern the agency's issuance of a subpena, or the agency's participation in an adjudication by the agency.

Subsection (d) provides methods and procedures for closing a meeting. A majority of the agency membership must vote to close and all votes on the issue of closing must be made public. If a meeting is closed, an explanation of the closing and a list of those expected to attend must be made public. A special short-cut procedure is provided in subsection (d) (4) for agencies who have a large volume of certain types of meetings and expect to close most or all of them.

Subsection (e) requires a week's notice of a meeting, unless agency business requires a lesser time period.

Subsection (f) requires a transcript or electronic recording to be made of a closed meeting, unless closed under exemption 10, relating to civil and adjudicatory proceedings. The transcript or recording shall promptly be made available to the public, except for such portions as the agency determines contain information falling within 1 of the 10 exemptions. The bill as reported by the Government Operations Committee requires that in place of each deletion, the agency must explain the reason and the statutory authority therefor. The Judiciary Committee has recommended that this provision be deleted, but we are opposed to their amendment and will request a separate vote on it when the bill is read for amendment under the 5-minute rule. For meetings that are open to the public—and the idea of the bill is that most agency meetings will be open—only minutes of the meeting need be kept.

Subsection (g) requires agencies to promulgate regulations implementing the legislation.

Subsection (h) provides for judicial review of alleged violations of the open meeting provisions. A plaintiff may sue where the meeting is held, where the agency has its headquarters, or in Washington, D.C. If the court finds that a meeting has been closed unlawfully, it may enjoin future violations or order the release of such portions of the transcript as do not contain exempt information. A court acting solely under this section may not invalidate the substantive agency action taken at the meeting in question, even if it was unlawfully closed. In a judicial proceeding for review of a substantive agency action, the reviewing court may consider, under 5 U.S.C. 706, whether the provisions of this bill have been complied with.

Subsection (i) authorizes an award of attorney fees to a party suing under this section who substantially prevails. Costs may be assessed against a plaintiff only where he has initiated the action primarily for frivolous and dilatory purposes.

Subsection (j) requires annual agency reports to Congress on compliance with this section.

Subsection (k) provides that this act does not affect rights under the Freedom of Information Act, except that the transcripts made under this act are to be governed by this act.

Subsection (l) provides that this section does not constitute authority to withhold information from Congress and does not authorize the closing of any meeting otherwise required to be open.

Subsection (m) provides that nothing herein allows an agency to withhold from an individual a record otherwise available to him under the Privacy Act.

Subsection (n) provides that if any meeting is subject to both this act and the Federal Advisory Committee Act, the provisions of this act shall govern.

EX PARTE COMMUNICATIONS

Section 4 contains the provisions of the bill regarding ex parte communications. It prohibits anyone having an interest in a proceeding to make an ex parte communication to an agency decisionmaking official relative to the merits of a proceeding once the proceeding has been noticed for a hearing. Communications made in violation of this prohibition are to be placed upon the public record.

For a violation of the prohibition, an agency would have discretion to impose sanctions. In an extraordinary instance, these could even

include loss of the proceeding on the merits by the violator, but where the violator can demonstrate that the violation was inadvertent, the imposition of so drastic a sanction would be arbitrary and not proper.

GENERAL PROVISIONS

Section 5 makes two amendments of a conforming nature, and section 6 provides that the bill shall take effect 180 days after its enactment and that implementing regulations shall be promulgated prior to the effective date.

Mr. Chairman, I include the following letters in support of the pending legislation for the further information of the Members:

CONSUMER FEDERATION OF AMERICA,
Washington, D.C., July 28, 1976.

Hon. BELLA S. ABZUG,
Hon. DANTE B. FASCELL,
U.S. House of Representatives,
Washington, D.C.

DEAR REPRESENTATIVES ABZUG AND FASCELL: Consumer Federation of America, the nation's largest consumer organization representing more than 30 million consumers, enthusiastically supports the Government in the Sunshine Act (HR 11656).

It is no secret that public confidence in government is at an all time low. A major source of citizen cynicism is the growing conviction that government decisions are often made behind closed doors with access and input being too frequently the exclusive privilege of well-financed special interest groups. The public recognizes the transparence of the standard government position that it can only conduct business effectively if its proceedings are closed to the public.

The legislation which will be considered today is a sensible and drastically needed step in the direction of providing citizens with the opportunity to better scrutinize the vast number of meetings conducted daily at multi-member agencies. It also recognizes the importance of establishing procedures for ex-parte communications.

We are actively opposed to a series of amendments whose architect is Arthur Burns and whose sponsor will undoubtedly be Rep. Frank Horton.

1. DEFINITION OF MEETING

The first amendment would restructure the definition of meeting in such a way that if the announced purpose of the agency meeting was not to "conduct business" the meeting would not be classified as an "open meeting" which the public could automatically attend. Clearly this amendment could and would be used by agency officials intent on thwarting the goal of this legislation. How easy it will be to camouflage a business meeting behind some non-business sounding announced topic. With no objective standard to determine what is a meeting "to conduct business" the ability for judicial review of agency abuse will, practically speaking, be non-existent.

MINUTES VS. VERBATIM TRANSCRIPTS

The second amendment would permit the taking of minutes as opposed to the requirement of a verbatim transcript at "closed" meetings. Minutes taken by the most competent of people are no substitute for the comprehensive verbatim transcript. For example, a particular monologue, dialogue or phraseology may at the time of the actual meeting seem inconsequential and consequently either be omitted from the minutes or paraphrased. Yet later that very issue may be extremely important to affected persons. The participants and the public should never have to rely on minutes of the proceedings. If the issue is serious enough to warrant being discussed at a meeting, any discussion at that meeting should be transcribed. In closed meetings even more than open meetings there must be a check against inaccurate or incomplete minutes.

TRANSCRIPT EXEMPTION

The third amendment would exempt SEC and the Federal Reserve Board from the transcript requirement.

SEC/BANKING AGENCY EXEMPTION

The fourth amendment would be a generic description having the practical effect of excluding the SEC and banking agencies.

There is no logical or equitable reason for either amendment and the amendments are particularly offensive because they are new examples of the FED's consistent attempts to arrogantly transcend accountability.

Finally, we would like to emphasize our active support of an amendment which we understand will be introduced by you, Rep. Fascell. That amendment would require that at anytime there is a "deletion" from the transcript, there must be submitted a written statutory citation to that section of the law which would allow such a deletion. This amendment will ensure an additional measure of accountability into the bill.

Sincerely,

CAROL TUCKER FOREMAN,
Executive Director.
KATHLEEN F. O'REILLY,
Legislative Director.

CONGRESS WATCH

JULY 27, 1976.

DEAR REPRESENTATIVE: This week the House will vote on the Government in the Sunshine legislation, H.R. 11656, which has been reported by both the Government Operations and Judiciary Committees following thorough hearings and committee debate. We urge you to support this legislation which provides for open meetings in multimember executive branch agencies and sets uniform standards for ex parte contacts. We also urge you to oppose the four Arthur Burns amendments to be offered by Representative Horton and to support the Fascell amendment.

In testimony more than ten years ago, prior to enactment of the Freedom of Information Act, the Federal Reserve testified that an information act would impair the Board's effectiveness both as an instrument of national economic policy and as a regulatory body. In the 94th Congress Arthur Burns made similar predictions of doom about the Sunshine bill, although he admitted in public testimony that the Federal Reserve Board has had no problem under the Freedom of Information Act, a statute of similar purpose and design. In spite of this admission, Burns has lobbied strenuously to remove the Board from the bill. He failed in the Senate and he failed in both House Committees. He should not succeed on the House floor.

The following four weakening amendments which will be proposed on the floor are overlapping because they are all designed to accomplish the same goal: complete or partial exemption of the banking agencies.

1. *Definition of Meetings:* The bill as reported defines a meeting which must be open in terms of what actually occurs—whether agency business is conducted or disposed of. This is an objective standard about which there can be little dispute—either business was conducted or it was not. The agenda for the meeting will state what is intended to be accomplished, but any determination of whether the provisions of the bill apply will be governed by what actually took place. If during a meeting a subject comes up which is covered by one of the 10 exemptions in the bill, the agency can move into executive session, a routine procedure.

The Burns amendment, in contrast, would allow a determination of whether the bill applied on the basis of the intended purpose of the meeting. Thus, if the intended purpose of the meeting is not to conduct business, but it gets conducted anyway, the open meeting provisions would not apply. Passage of this amendment would encourage agencies desiring to avoid open meetings to initiate "gatherings" for one purpose and use them for another. The public has had enough deceptions in government without this subterfuge.

If members are seriously worried that the bill might be interpreted as applying to informal conversations between commission members at social events or on the golf course, they can easily have a colloquy to clarify the legislative history.

2. *Verbatim Transcripts or Recordings:* The bill as reported requires a verbatim recording or transcript be made of any meeting which is closed under the exemptions in the bill, and the subsequent public release of any portions which it turns out are not subject to the exemptions.

The Burns amendment would delete any requirement for recordings or transcripts and substitute instead a requirement for minutes. Anyone who has ever attended a board of directors meeting knows what minutes are. They bear little

resemblance to the content of the meeting and contain only what the attendees want to reveal.

In addition to the obvious deficiencies of summary minutes, there are strong reasons for taking transcripts or recordings at closed meetings. Any discussions covering non-exempt material which the public is entitled to know can subsequently be released verbatim. If the closing of the meeting is challenged, the court *in camera* can tell exactly whether the meeting should or should not have been closed and make a definitive ruling to guide future actions. And, disclosure of the transcript is the only remedy in the bill for improper closing of a meeting. Many state laws have far harsher remedies. Twenty-four of the 49 state sunshine laws have criminal penalties for improper closing of meetings, and 19 can render the actions taken at an improperly closed meeting void or voidable. H.R. 11656 has no similar provisions. The only remedy is release of the transcript or recording. Deletion of this provision will be an incentive for avoidance of the law. And there is no evidence that an agency which has transcripts or recordings of closed meetings will allow their improper release any more than they now allow improper release of documents (such improper release also subjects a person to criminal penalties under Title 18 of the U.S. Code).

3. *Transcripts or Recordings for the Fed and SEC:* This amendment is a variation on number 2. It would prohibit transcripts or recordings at meetings closed because of exemption 9(A), that is an agency which regulates currencies, securities, commodities, or financial institutions and the information would be likely to lead to significant financial speculation or significantly endanger the stability of any financial institution. The deficiencies in the amendment are the same as for number 2. It just applies to fewer agencies.

4. *Exemption of Banking Agencies:* The final Burns amendment would exempt from the bill any agency responsible for national monetary policy or regulation of financial institutions except for certain programs such as truth-in-lending, fair credit reporting, fair housing, equal credit, and home mortgage disclosure. There is no rational basis for exemption of these agencies which have for so long tried to hide from public view while at the same time impacting the lives of citizens.

Finally, one important corrective amendment which we urge you to support will be offered by Representative Dante Fascell to require a reason and statutory authority for deletions from the transcripts or recordings of closed meetings. This is an important regulatory reform amendment to permit accurate oversight of agency decisions. Without such minimal information, citizens will have no knowledge of why the meeting was closed and will be put in the position of challenging the agency willy-nilly or not at all. The Freedom of Information Act requires an agency to give a citizen an explicit reason and citation for denial of information. This has not only not been a burden; it has streamlined the operation of the Act. There has been no showing it would not similarly apply here. and without such a requirement in the Sunshine Act there will be no ability by the public or the Congress to oversee the discretionary actions of the federal agencies.

Sincerely,

JOAN CLAYBROOK.

Mr. MARTIN. Madam Chairman, will the gentlewoman yield?

Ms. ABZUG. I yield to the gentleman from North Carolina.

(Mr. MARTIN asked and was given permission to revise and extend his remarks.)

Mr. MARTIN. Madam Chairman, let me thank the gentlelady from New York, the distinguished chairman of the subcommittee, for yielding to me.

In order to clarify subsection 3(c) of this bill, H.R. 11656. in this subsection are set forth some 10 standards that would qualify an agency to choose to close its meetings to the public and not disclose its deliberations.

When I served as county commissioner in Mecklenburg, N.C., we adopted a similar policy requiring open meetings—subject to certain reasonable exceptions. One exception which we found to be essential to our duties was the consideration of prospective real estate transactions. We knew that if we publicly discussed proposals to purchase or lease land or facilities and disclosed any details about it, the price

of that land or facility would rise. That would especially be true if the owner/seller could see how much we might be willing to pay, or that our alternative opportunities were limited or that we were especially anxious to buy. So we closed our meetings until we could get an option on one or more properties.

In examining subparagraph 3(c)(9)(B) of this bill, I find language which may or may not allow this principle. Subparagraph (9B) protects "information the premature disclosure of which would * * * significantly frustrate implementation of a proposed agency action." I would ask my colleague whether it is intended to include under this exception the preliminary discussion of proposed real estate transactions.

Ms. ABZUG. To answer the gentleman from North Carolina (Mr. MARTIN), Madam Chairman, I think there is no question that subsection (9)(B), which reads: "(B) in the case of any agency, be likely to significantly frustrate implementation of a proposed agency action . . . ," would cover very well the circumstance which the gentleman from North Carolina (Mr. MARTIN) describes.

Mr. MARTIN. Madam Chairman, I thank the gentlewoman from New York for that answer, and I appreciate the gentlewoman's yielding.

Mr. HORTON. Madam Chairman, I yield myself such time as I may consume.

(Mr. HORTON asked and was given permission to revise and extend his remarks.)

Mr. HORTON. Madam Chairman, I subscribe wholeheartedly to the objectives of this legislation. The public's faith in the integrity of Government rests on public understanding of the reasons for governmental decisions, and on the accountability of Government officials for those decisions which set legislative or administrative policies which impact on the Nation as a whole. However, as recognized in the declaration of policy of H.R. 11656, the public is not necessarily served by complete and unfettered disclosure of all Government decisionmaking processes. The words "fullest practicable information" as used in the bill indicate the need for certain sensible limitations.

My principal concern is that the Congress which has enacted the two basic planks for Federal information policies, the Freedom of Information Act and the Privacy Act, should adopt a sunshine bill which is consistent with the principles laid down in the two landmark bills we have already enacted. The bill before you does not fully meet this standard since it erodes the clarity and firmness of the FOI Act exemptions, and threatens to erode the privacy protections we have erected for those involved in adjudications before collegial agencies.

I believe that a number of provisions of H.R. 11656 are inconsistent with the declaration of policy contained in the bill itself, and that these provisions would permit or mandate disclosures which would injure the rights of individuals and injure the ability of the Government to carry out its responsibilities.

I address my concerns with several specific provisions of H.R. 11656 in the Committee on Government Operations, and in a statement filed with the Subcommittee on Administrative Law and Governmental Relations of the Committee on the Judiciary.

At that time, I took issue with the following features of H.R. 11656: First, the verbatim transcripts requirement for closed meetings, second,

the definition of "agency," third, the definition of "meeting," fourth the identification of persons expected to attend a closed meeting, fifth, the prescribed venue for actions brought under this legislation, sixth, the personal liability of individual agency officials, and seventh, the unfettered disclosure of all ex parte communications.

Since then certain improvements have been made by the Judiciary Committee, but serious problems still exist. But I feel it is possible to amend the bill in a way that would let every bit as much sunshine behind the doors of Government agency deliberations and provide a brand of sunshine which is less clouded by procedural redtape and confusion than that created by H.R. 11656.

If the Judiciary Committee amendments are adopted my remaining differences with the bill concern primarily the verbatim transcript requirement and the definition of meeting and at an appropriate time I shall offer an amendment to each of these provisions.

The verbatim transcript requirement of H.R. 11656 as reported by the Government Operations Committee could effectively destroy the provisions of the bill which permit certain meetings to be closed. While the provisions of the bill enable an agency to delete, by recorded vote at a subsequent meeting, sensitive portions of a transcript, they also require the agency to furnish the public what, in effect, are summaries of the deleted portions. In the case of agencies involved in the regulation of financial institutions, for example, harmful inferences drawn from the deletions could result in market speculation or damage to the stability of our financial markets and institutions.

The possibility of later disclosure of a verbatim transcript will inhibit free discussion about sensitive matters and thus impair the decisionmaking process in instances where candor is essential.

Moreover, the effect of the transcript requirement of the bill when coupled with relevant procedural requirements would lead to a situation bordering on the ridiculous.

The bill provides that votes to close meetings must be cast in person, no proxies being permitted. Thus a meeting must be held to vote on closing a subsequent meeting or meetings, and another meeting must be held to vote on any change in the time, place, or subject matter of a meeting already announced.

When these procedural requirements are coupled with the verbatim transcript or electronic recording requirements, the prospect is one of mind-boggling infinity. Thus, when a meeting is properly closed, the complete transcript or electronic recording of the proceedings must be made available to the public except for such portions determined by a recorded vote to fall within the exemptive provisions. In order to avoid the disclosure of such portions of the transcript, the meeting called to discuss, consider and vote on the proposed deletions must also be closed pursuant to the procedural requirements cited above. Since this meeting would be closed to consider information coming within the exemptive provisions of the bill, the complete transcript of electronic recording of such meeting must also be made available to the public except for those portions determined by a recorded vote to fall within the exemptive provisions. Again, in order to avoid the disclosure of such portions of the transcript of the second closed meeting, a third meeting called to consider and vote on the proposed deletions stemming from the second meeting must be closed, and the transcript of that meeting must be examined at a fourth closed meeting and so

on and on ad infinitum. Obviously, some rule of reason must prevail in the implementation of such a provision, but the letter of the law, if observed, would be paralytic in its effect.

The Judiciary Committee amendments eliminate the requirement for agency members to vote upon deletions from transcripts and the requirement that agencies provide explanations of the reasons for deletions and the exemption relied upon. However, harmful inferences can still be drawn from the deletions and the possibility of later disclosure will inhibit full exchange of views on sensitive issues.

I do not subscribe to the position that the transcript requirement is essential to the enforceability of the act and I feel that a reasonable compromise can be worked out in this area along the lines of an amendment that I plan to introduce at an appropriate time. The amendment would substitute minutes for verbatim transcripts or electronic recordings. The discovery procedures available to U.S. district courts do not depend upon the availability of verbatim transcripts or electronic recordings of agency meetings. While the concepts embodied in H.R. 11656 stem from "sunshine" or "open meeting" statutes of the States, none of the 49 State statutes, so far as I can determine, has a verbatim transcript requirement for either open or closed meetings.

Meetings covered by the bill should be those gatherings for the purpose of conducting official agency business of at least the number of individual agency members required to take final action on behalf of the agency. The meeting definition in both versions of H.R. 11656 would apply even to casual or social encounters which were not gatherings for the purpose of acting in behalf of the agency. The Judiciary Committee version is the more burdensome and refers to any "assembly or simultaneous communication." Accordingly, I shall offer an amendment to narrow the definition to cover meetings for the purpose of conducting agency business.

I feel that venue for actions brought under this legislation should be limited in accordance with language in the Judiciary Committee amendments, that is to the district in which the agency in question has its headquarters or where the meeting in question occurred or in the District Court for the District of Columbia. The bill as reported by the Committee on Government Operations permits such actions to be brought also where the plantiff resides or has his principal place of business. This could lead to duplicative lawsuits spread across the country covering the same agency meeting or meetings.

I oppose the provisions of H.R. 11656 as reported by Government Operations imposing personal liability on individual agency members for attorney's fees and court costs. The assessment of attorney fees and other litigation costs personally against individual members of an agency can only lead to a further diminution of the rewards of public service. This provision would not only discourage qualified persons from accepting agency appointments, but would inhibit performance of official duties by those in office. The Judiciary Committee amendment prudently deletes this requirement.

It is not possible to estimate the costs of complying with the provisions of H.R. 11656. Certainly the time of a majority of the entire membership of an agency spent in the repeated voting sessions attendant upon closed meetings; the time spent by lawyers and other staff members examining documents; litigation costs arising from actions created by the bill; the administrative burden of preparing

a verbatim transcript of each closed meeting, of deleting exempt portions and of providing a copy of the remainder to the public will be significant.

Let me not be misunderstood. My amendments are not intended to weaken the disclosure requirements of the bill but rather to improve it by achieving a balance between the disclosure requirements and the need for government to operate effectively. Neither complete confidentiality nor complete disclosure is desirable and we need to guard against the temptation to overcompensate for past secrecy in today's morbid climate of distrust and suspicion.

Mr. FLOWERS. Madam Chairman, I yield myself such time as I may consume.

(Mr. FLOWERS asked and was given permission to revise and extend his remarks.)

Mr. FLOWERS. Madam Chairman, I shall be very brief here. Our committee, the Committee on the Judiciary, and the subcommittee which I chair, the Subcommittee on Administrative Law and Governmental Relations, was referred this bill on a sequential basis.

The gentleman from Texas, the distinguished chairman of the Committee on Government Operations, and I, as well as other Members have been somewhat concerned in the last year and a half over what we have gotten ourselves into with dual reference and sequential reference. I am afraid that unless we straighten out our proceedings in this regard before the organization of the next Congress, we are going to find a whole lot of redundant work being done in the 95th Congress like it has been done in the 94th Congress. I hope that someone with more wisdom than I can figure out the solution while maintaining the jurisdictional integrity of the various committees. But I think were it not for the fact that the gentleman from Texas is in the peculiar situation of being the ranking Democrat on the Committee on the Judiciary and the chairman of the distinguished Committee on Government Operations as well, thereby having a position of leadership on both committees having jurisdiction not only of this legislation but of some previous legislation, we could have had some problems in the handling of the bill. Of course, I always welcome the opportunity of working with my distinguished friend from Texas, but we both agree that there is too much ground to be plowed for us to be going over each other's work.

Mr. BROOKS. Madam Chairman, will the gentleman yield?

Mr. FLOWERS. I yield to the gentleman from Texas.

Mr. BROOKS. I thank the gentleman for yielding.

I want to commend the gentleman from Alabama for doing a splendid job on the Committee on the Judicary in handling this legislation, and I want to say that I share with him a feeling that this is a duplicating effort on the part of Congress.

We refer a bill to the "A Committee," it works up a bill, the subcommittee has hearings, the legislation is reported by the full committee, and then the bill goes to the Rules Committee to come to the House, and then we have to make up our mind here in Congress to vote for it or not. It is a duplication of effort; confusing bothersome, troublesome, generally a pain, inefficient, and often ineffective when we have to send legislation to another committee and start over through the whole series.

I would say I hope when this new Congress starts we can change this sequential reference because the time has come when we have bills referred to four or five committees. If we want to get anything done in Congress that is not the way to do it. I want to say I share the feelings of my friend, the gentleman from Alabama (Mr. FLOWERS) on this particular subject.

Mr. FLOWERS. We have now before our subcommittee a bill that is referred to four committees for the purposes of those matters under the jurisdiction of the several committees. As the gentleman knows this generally means that when one has a bite at the apple he just takes a look at the place where it looks best.

We are not always going to be on the receiving end of this matter, because the last time we had an issue between two committees it was our committee that had primary jurisdiction and the Government Operations Committee had the second bite, so this is just an evening out process and in working with the leadership on both sides we hope to circumvent this problem of redundancy in the future.

Mr. HORTON. Madam Chairman, will the gentleman yield?

Mr. FLOWERS. I yield to the gentleman from New York.

Mr. HORTON. Madam Chairman, would the gentleman explain to the House and to the committee what he intends to do with regard to the action taken by the Judiciary Committee? What is his intention?

Mr. FLOWERS. If the gentleman will allow me to proceed, I will speak very briefly to the merits and what I intend to do here this afternoon.

We had sequential reference in our committee and we then went over the entire bill with a view to making whatever amendments we deemed to be appropriate. We did make about 10 or 11 amendments, some of them more or less technical in nature and some 3 or 4 rather substantive in nature. I intend at the appropriate time to offer an amendment in the nature of a substitute which will embody all of the amendments that were approved by the Judiciary Committee as well as those amendments that were approved by the Government Operations Committee. There would then be no committee amendments to the bill coming from either committee.

Then the parliamentary situation, as this Member would understand it, is at that point the substitute would be subject to amendment. The gentleman has some amendments, I know the gentleman from California (Mr. MOORHEAD), the ranking minority member on the subcommittee has some amendments, as well as the gentleman from Ohio (Mr. KINDNESS), and we will proceed on those amendments.

I understand that there will be objection on the part of the Government Operations on this side of the aisle to one of the amendments that is in the package of the substitute. The gentleman from Florida (Mr. FASCELL) will offer an amendment to the substitute at one point dealing with the transcript, and then we will proceed as quickly as possible on each one of these things and finish the matter in a very short time.

Mr. HORTON. Madam Chairman, if the gentleman will yield again, I feel that is a very expeditious way to handle this matter because it would be very complicated if we have to handle it by amendment, but with the substitute we would have the entire bill as passed by the Government Operations Committee as amended by the Judiciary Committee, and we can exercise our will on that basis.

Mr. FLOWERS. Madam Chairman, meetings of agencies subject to the provisions of this bill are to be open to public observation unless information being discussed at the meeting falls within an express exception. Public awareness and interest in Government are important in our democratic procedures. This bill, by promoting increased openness in Government, should lead to improved decisionmaking and greater accountability on the part of the Government.

The Committee on the Judiciary was referred this bill on a sequential basis and prior to the Committee on the Judiciary reporting the bill, the bill had been the subject of a report by the Committee on Government Operations. Since the two committees are in essential agreement on the bill, I will confine my remarks to the amendments proposed by the Committee on the Judiciary.

First, the committee recommended a change in the definition of "meeting" as provided in new section 552b added to title 5 by the bill. As so amended, the term "meeting" would mean an assembly or simultaneous communication concerning the joint conduct or disposition of agency business by two or more, but at least a number of individual agency members required to take action on behalf of the agency. There would be an exception for meetings required to decide matters covered by subsection (d), the subsection concerning the closing of meetings. The meetings covered by the exception would concern matters which are procedural in nature and involve decisions in voting on closed meetings and on announcement of meetings. Such meetings could not include the conduct or disposition of any other agency business. The committee also recommended an amendment to subsection (b) to add language providing that agency members cannot jointly conduct or dispose of agency business other than as provided in new section 552b. The amended subsection would not preclude agencies from disposing of noncontroversial matters by written circulations.

The subcommittee added the words "or permitted" to exception (3) of subsection (c), which is the exception permitting closing of meetings involving information authorized to be withheld by statute. Prior to the amendment, only those statutes which "required" the withholding of information would authorize the closing. By the insertion of the words "or permitted", many statutes which now permit the withholding of information but allow judgment or discretion will be given force and effect. This amendment is consistent with the language and purpose of those statutes which provide the basic authority for such withholding.

Exception (7) of subsection (c) concerns the closing of meetings in order to avoid disclosure of investigatory records compiled for law enforcement purposes. The exceptions in this bill were patterned after the Freedom of Information Act as set forth in the Administrative Procedure Act provisions of title 5 of the United States Code in section 552. That section concerns written records. This bill has a slightly different orientation and concerns the right of the public to observe agency meetings at which information will be given in oral discussions. This amendment makes a necessary clarification as to the exception so that it applies to information which, if written, would be contained in such investigatory records.

Exception (9) permits the closing of meetings when the premature disclosure of certain information could lead to financial speculation, endanger the stability of a financial institution, or frustrate the im-

plementation of a proposed agency action. In the latter case, the exception would not be available after the content or nature of the agency action had already been disclosed to the public. Amendments were added by the committee to clarify the exception by express language as to the time when the exception would no longer be available. This was done by providing it would not be available after the disclosure or after public notice of rulemaking as provided in the Administrative Procedure Act.

Paragraph (4) of subsection (d) permits the closing of meetings pursuant to agency rules in certain instances where a majority of the business would justify closing, in other words, meetings that fit certain categories. The committee added a clarification to better identify the meetings subject to the exception and this was done by deleting the words "of the portions" where the original language would have required that a majority of the portions of agency meetings would have to be closed in order to permit closing by rules, and substituting therefor, the majority of meetings for the same purpose, it being very difficult to determine a majority of "portions" of meetings.

TRANSCRIPT REQUIREMENT

Subsection (f) of the new section concerning transcripts of closed meetings and requires that a complete transcript or an electronic recording which is adequate to record the proceeding shall be made of each agency meeting or portion of a meeting closed to the public with the single exception of meetings closed to the public pursuant to paragraph 10 of subsection (c). The committee considered the difficulties incident to the review of the transcript of closed meetings required by the original provisions of the bill. The bill would have required that each deletion authorized by an exception in the section would be made by recorded vote of the agency taken subsequent to the meeting. It was pointed out this would require a considerable expenditure of the time of the senior officials of the agency and that this would be cumbersome and time consuming. It was determined that the intent of the bill could be adequately carried out by deleting this provision and similarly deleting the provision requiring a written explanation of the reason and statutory basis for each deletion.

These amendments would not change the requirements of the section making revised copies of the transcript or transcription of the electronic recordings available to any person upon payment of the cost of duplication or its transcription. Further, it is provided that if the agency determines it to be in the public interest, the material can be made available to the public without cost. The complete verbatim copy of the transcription or the complete electronic recording of each meeting closed to the public would be maintained by the agency for at least 2 years after the meeting or until 1 year after the conclusion of the agency proceeding with respect to which the meeting was held, whichever occurs later.

COURT JURISDICTION UNDER SECTION 552b(h)

Subsection (h) provides jurisdiction in the district courts of the United States to enforce the requirements of sections (b) through (f) of the new section. Such actions may be brought by any person against

the agency prior to or within 60 days after the meeting at which the alleged violation of the section occurred. The time limit would be varied in the event that a public announcement of the meeting had not been made in accordance with the requirements of the section. The original version of the bill would have provided jurisdiction in the courts to bring such actions against the agency or its members. The committee recommended the deletion of the provision for joinder of members for since the subsection authorizes an action against the agency, there would be no necessity to join individual members to gain court jurisdiction.

Further, the committee also amended the bill to delete the provision authorizing the assessment of court costs against individual agency members. These amendments remove the objection that individual agency members would be subjected to suit for official acts and possibly being assessed costs and attorneys fees in these circumstances. In line with these principles, the committee recommends the deletion of the provision in original subsection (j) which would have permitted the assessment of costs against individual members of an agency.

Objections were raised at the hearings on the bill concerning the breadth of the provisions concerning venue for actions authorized by the bill. The committee concluded that there should be no limitation upon the jurisdiction provided in the bill nor persons who could bring the actions contemplated by the bill. However, the bill concerns meetings and matters relating to meetings that have a definite relation to certain locations, and the practical aspects concerning Government action and court consideration of these matters make it logical to provide venue in the district where the agency is held, where the agency has its headquarters, or in the District Court for the District of Columbia.

SCOPE OF JUDICIAL REVIEW

Subsection (i) of subsection 552b as contained in the bill referred to the committee would have provided that any Federal court otherwise authorized by law to review agency action could on application of any person properly participating in the judicial review proceedings inquire into the violations of the requirements of the section and afford any relief deemed appropriate. The committee recommends deletion of this language. It was concluded that the provisions of section 706 of title 5 of the Administrative Procedure Act provides adequate authority to inquire into the matters apparently referred to in original subsection (i).

Section 706 concerns judicial review and details the basis for invalidating agency action. Item 2(d) as contained in that section authorizes a court to set aside agency action which was taken "without observance of proceedings required by law." In consideration of matters covered by this section, the courts, in reviewing actions, would then therefore be prepared to proceed in accordance with their normal procedures under section 706. The weight to be given violations of the provisions of section 552b would be considered as are other matters covered by this provision in the Administrative Procedure Act. The reviewing court would then be in a position to determine whether the violation was of material prejudice to the party involved.

EX PARTE PROCEEDINGS

Section 4(a) of the bill adds a new subsection (d)(1) to section 557 of title 5, United States Code, concerning ex parte communications in relation to adjudication and formal rulemaking under the Administrative Procedure Act. Section 557 concerns decisions based on the record of hearings conducted in accordance with section 556. The new subsection (d) added by this bill would provide express limitations and procedures relating to ex parte communications relative to the merits of agency proceedings. The bar would apply to ex parte communications relative to the merits of such proceeding by interested persons outside the agency made to agency personnel involved or expected to be involved in the decisional process.

Similarly, no such agency official could make an ex parte communication to an interested party outside the agency. The incorporation of the new subsection in section 557 results in the provisions being made applicable to adjudications and to formal rulemaking. The language of the bill provides for communications or memorandum of oral communications to be made a part of the public record of the proceedings along with written responses and memorandums of oral responses. In the event there is such an ex parte communication, the agency, administrative law judge, or presiding employee may require a party to show cause why his claim or interest in the proceeding should not be denied, dismissed, or disregarded, or otherwise be acted upon adversely.

As introduced, the bill would have also amended the Freedom of Information Act provisions of section 552(b)(3) to limit the exception for information covered by statutes to only information covered by statutes to only information covered by statutes which require that information of a particular type or criteria be withheld. This would not provide an exception for statutes which permit the agency to determine whether such information should be released or not. The amendment was made because the language is unduly restrictive. For example, the section concerning release of atomic energy information permits a continuous review of restricted data to permit declassification where information may be declassified "without undue risk to the common defense and security" 42 U.S.C. 2162.

Mr. Chairman, I urge the approval of the bill with the amendments recommended by the Committee on the Judiciary.

Madam Chairman, I reserve the balance of my time.

Mr. HORTON. Madam Chairman, I yield 10 minutes to the gentleman from California (Mr. MCCLOSKEY).

The CHAIRMAN. If there is no objection, the Chair would like to recognize the gentleman from California (Mr. MOORHEAD) for 30 minutes and then come back to the gentleman from New York (Mr. HORTON).

The Chair now recognizes the gentleman from California (Mr. MOORHEAD) for 30 minutes.

Mr. MOORHEAD of California. Madam Chairman, I yield myself such time as I may consume.

Mr. HORTON. Madam Chairman, will the gentleman yield?

Mr. MOORHEAD of California. I yield to the gentleman from New York.

Mr. HORTON. Madam Chairman, a parliamentary inquiry.

The CHAIRMAN. The gentleman will state the parliamentary inquiry.

Mr. HORTON. Madam Chairman, is it the intention of the Chair to rotate?

The CHAIRMAN. Yes, that is the intention of the Chair.

Mr. HORTON. Would the gentleman from California (Mr. MOORHEAD) then have 30 minutes before I come back to my time?

The CHAIRMAN. The gentleman will probably use a portion of that 30 minutes himself. We will then come back to the gentlewoman from New York (Ms. ABZUG) and to the gentleman from New York (Mr. HORTON).

Mr. HORTON. Madam Chairman, I thank the Chair.

(Mr. MOORHEAD of California asked and was given permission to revise and extend his remarks.)

Mr. MOORHEAD of California. Madam Chairman, I yield myself such time as I may consume.

Madam Chairman, this piece of legislation that is before us has a very commendable goal, that is, to give the people of America an insight and information as to the operation of our Government. However, this right also must be balanced against a very delicate scale as to the damage and mischief that can be done in any given instance in holding back the effective operation of Government. It must be balanced if we are going to do the job that is required of us. Government in the sunshine is not logical if our Nation's security is compromised by such disclosures. Sunshine is blatantly unfair, perhaps unconstitutional, if it impinges upon individual privacy rights. Sunshine is irrational if it interferes with or threatens our Nation's economic stability or the value of our currency.

My point is that the idea behind Government in the sunshine legislation is attractive and valid only with respect to certain governmental activities. Everyone in this House knows that there are certain activities of Government that cannot and should not be in the public realm or released for general distribution. So, in drafting this type of legislation, we must be very careful about every detail of its impact. Sunshine legislation should not be used as a vehicle to interfere with Government agencies in the valid performance of the functions for which they were created.

H.R. 11656, as amended by the Committee on the Judiciary, goes a long way towards recognizing the important balance of which I am speaking. Both the judicial review and venue provisions in the bill have been improved. An irrational and unnecessary punitive provision imposing liability for court costs and attorneys' fees on individual agency officials has been removed. Importantly, the Judiciary version of this legislation has made the controversial verbatim transcript requirement more reasonable by allowing the deletion of exempt material from meeting transcripts. If this onerous and contradictory requirement is retained in the final bill, it is my hope that the Judiciary modification will also be retained.

Finally, an unwise attempt to reverse the Supreme Court's decision in *Administrator, F.A.A.* v. *Robertson*, 422 U.S. 255 (1975), has been altered.

It is my hope that all of the improving amendments added to H.R. 11656 by the Committee on the Judiciary will receive favorable action

in this House. These amendments would make this legislation less ambiguous, less likely to produce extensive litigation, and far less likely to impose unrealistic and unfair burdens on Government agencies and officials.

I also strongly urge that the House favorably consider additional improving amendments that will be offered by my good friend and colleague, the gentleman from New York (Mr. HORTON). As it comes to the floor, H.R. 11656 defines "meeting" in a confusing and ambiguous manner. This definition is pivotal in the understanding of the scope of the Government in the sunshine legislation. More specificity is required and the amendment of the gentleman from New York (Mr. HORTON) would accomplish that.

The gentleman from Ohio (Mr. KINDNESS), a member of our Judiciary Subcommittee, also has a very important amendment to offer to this legislation, specifying which agencies are to be subject to this act.

I will offer an amendment later on in the debate which would provide that persons bringing an action under this legislation must meet normal Federal court standing requirements.

The legislation, as it is presently written, changes the present court rules to allow any individual, whether he has an interest or not, to bring litigation. This only causes a disruption of our entire court system. It allows professional litigators to get involved for whatever purposes they might want to, many times to make a case for themselves or to make a financial benefit of some kind through encouraging groups to finance their actions. I will offer an amendment which will do away with this particular provision.

I believe that we have made some substantial steps toward improvement in the action of the Judiciary Committee, and for that reason my comments on the sequential referral would not be the same as some of my colleagues have been earlier. I think in this particular case we have made substantial improvements in the case of sequential referrals. I realize, however, that many times it does cause a delay in getting legislation before the House.

My purpose here today is not to be obstructive to this legislation. I strongly agree with the ideals and principles underlying Government in the sunshine legislation. I do not want to hurt the operation of our Government, and for that reason I am supporting the amendments I have already referred to.

Ms. ABZUG. Madam Chairman, I yield such time as he may consume to the gentleman from Florida (Mr. FASCELL).

(Mr. FASCELL asked and was given permission to revise and extend his remarks).

Mr. FASCELL. Madam Chairman, I rise in support of H.R. 11656, the Government in the Sunshine Act.

As the principal sponsor of this legislation in the House, I urge that it be adopted. The bill would make a long overdue reform in our governmental operations so as to help restore confidence among the public.

The bill has been carefully considered for many years. It has been introduced in the 92d, 93d, and 94th Congresses. There have been many hearings by various committees in the House and Senate, and there have been extensive contacts and consultations with the executive branch agencies affected.

The Sunshine measure builds on long experience with the Freedom of Information Act, the Administrative Procedure Act, and the Privacy Act. It is coordinated with those Acts so as to form a balanced and comprehensive information policy in the Federal Government.

The basic justification for this legislation is that citizens have a right to know what is being done by Federal agencies. They need to know not only the final decisions, but the discussions which go into those decisions.

Very few people would argue with the principle of Government in the sunshine. Actually, this is the cornerstone of our democracy. Without public access to information on governmental actions, there can be no adequate basis on which individual citizens can form judgments and cast their votes for those who exercise the functions of Government.

To the extent that secrecy exists in Government, I believe that by and large it is the product of inertia and the following of what seems at first glance to be the easiest expedient—that of withholding information from the public. After all, if the public does not know what happened or what has been done it cannot fault the officials who are responsible for such actions. Thus, the officials involved may feel that by excluding the public they can be safely immune from criticism if the results are not favorable.

Yet, in the long run, such secrecy causes more problems than it solves. Eventually, the truth usually leaks out, and when this happens after-the-fact, it breeds public distrust and condemnation which may be directed against officials other than those responsible for any misdeeds. The whole Government suffers when our people perceive that it is working secretly against them.

What we need is a means to shatter the complacency of officials who needlessly follow practices of secrecy and make it so difficult to operate in such a manner that a policy of open government becomes the easy way out. Then we will have true "government in the sunshine" as officials learn that opening the decisionmaking process to the public is not only harmless, but beneficial.

In seeking to open the conduct of public business by Federal agencies, we in the Congress are asking no more than we have already imposed on ourselves. In 1973, the House adopted legislation which I cosponsored amending the rules to strengthen the requirement for open hearings and open committee meetings including meetings for the markup of legislation. Prior to that action, 56 percent of House hearings and meetings were open to the public in 1972. In contrast, under the stronger open meetings rule adopted in the 93d Congress, 92 percent of all House committee hearings and markup sessions were open to the public in 1974.

I have seen no drastic adverse consequences as a result of the new congressional open meetings policy. Instead, the legislative output has been stepped up, and we can point with pride to the fact that any member of the public can find out virtually all he wants to know about congressional actions, if not more than he wants to know.

The legislation before you would take similar action with respect to Federal agency meetings. Some 50 agencies headed by more than one governing member, appointed by the President and subject to Senate confirmation, come under its provisions. These include such agencies as the Civil Aeronautics Board, the Federal Communica-

tions Commission, the Federal Maritime Commission, the Federal Trade Commission, the Interstate Commerce Commission, the Securities and Exchange Commission, and others.

H.R. 11656 sets forth the policy that the public is entitled to the fullest practicable information regarding the decisionmaking processes of the Federal Government. It is the purpose of the act to provide the public with such information while protecting the rights of individuals and the ability of the Government to carry out its responsibilities.

Under the bill, agencies may close meetings if the matters to be discussed fall within 10 exempted areas. These areas include national defense and foreign policy, internal personnel practices, information required or permitted to be withheld by another statute, trade information, law enforcement records, and information used by agencies that regulate the supervision of financial institutions.

These exemptions give ample leeway to any agency to protect information where there is a legitimate public interest in secrecy. The exemptions generally parallel the Freedom of Information Act and are consistent with the sound criteria developed through legislative study, administrative experience, and judicial interpretation.

We have included provisions under which a member of the public can go to court to challenge an agency's action closing a meeting or portion thereof. Reasonable attorney's fees may be awarded to a successful plaintiff at the discretion of the judge.

In cases where meetings are closed to the public, the agency is required to keep an electronic recording or transcript. In such cases, or where portions of meetings are closed, the original bill required that the agency explain the reason and statutory authority and provide a summary or paraphrase of the deleted material. The Government Operations Committee, after hearing objections to this from the Federal Reserve Board and others, approved a compromise which merely required a statement of the reason and statutory basis. Unfortunately, the Judiciary Committee amendments would strike even this requirement, so that only a blank space would be left in a transcript without even a hint of what had been removed, or by what authority. I hope that this proposed change is rejected by the House.

One of the reasons for requiring some reference to deleted material is to enable citizens to have some indication of the subject matter. This would enable them to exercise their rights to judicial review. Under the bill, a judge may examine a transcript in camera to determine whether deletions fit within the stated exemptions. Unless a person knows in general the type of subject affected, however, he would be unable to challenge a deletion.

I know that many Members have been contacted by the Federal Reserve Board or by other agencies with respect to provisions of the legislation. Each of their objections was considered in both the subcommittee and full Government Operations Committee, and further in the Judiciary Committee in many instances. We took votes on each objection. Some amendments were approved in line with agency recommendations. The others were found to lack merit, after extensive debate. There have been one or two subsequent matters raised, but on close examination, these also lack merit.

The bill sets forth a workable and practical system for opening up the operations of the agencies to public scrutiny. It makes no monumen-

tal changes, since to a large extent the bill will codify what agencies are already doing by regulation. In general, the agencies have no great problem with it. Even the burden on agency heads for complying with the requirement of votes on deletions has been exaggerated. This could easily be done by circulating a tally sheet. No second meeting is required.

It is true that the Federal Reserve Board will probably never be satisfied with any legislation which seeks to open its operations even partially. The agency would like to be excluded completely from the bill. Lacking that, it would like to avoid keeping a transcript. This is absurd. Even in the Congress, we keep transcripts on all our meetings. We deal with national security and other information at least as sensitive as anything done by the Federal Reserve Board.

We have listened to everything the Board has said and have more than compromised by approving a specific exemption for financial regulatory agencies which will enable them to close up anything with significant information discussed. To allow them to operate in total secrecy without even keeping a transcript would be a serious mistake.

The agencies' reasonable concerns have been accommodated. We have included a section on ex parte contacts which is not controversial. In short, the bill takes a fair and balanced approach toward the goal of increased public involvement in the governmental process.

I urge that the Government in the sunshine bill be approved.

CONSUMER FEDERATION OF AMERICA,
Washington, D.C., July 28, 1976.

Hon. BELLA S. ABZUG,
Hon. DANTE B. FASCELL,
U.S. House of Representatives, Washington, D.C.

DEAR REPRESENTATIVES ABZUG AND FASCELL: Consumer Federation of America, the nation's largest consumer organization representing more than 30 million consumers, enthusiastically supports the Government in the Sunshine Act (H.R. 11656).

It is no secret that public confidence in government is at an all time low. A major source of citizen cynicism is the growing conviction that government decisions are often made behind closed doors with access and input being too frequently the exclusive privilege of well-financed special interest groups. The public recognizes the transparence of the standard government position that it can only conduct business effectively if its proceedings are closed to the public.

The legislation which will be considered today is a sensible and drastically needed step in the direction of providing citizens with the opportunity to better scrutinize the vast number of meetings conducted daily at multi-member agencies. It also recognizes the importance of establishing procedures for *ex-parte* communications.

We are actively opposed to a series of amendments whose architect is Arthur Burns and whose sponsor will undoubtedly be Rep. Frank Horton.

1. Definition of Meeting.

The first amendment would restructure the definition of meeting in such a way that if the announced purpose of the agency meeting was not to "conduct business" the meeting would not be classified as an "open meeting" which the public could automatically attend. Clearly this amendment could and would be used by agency officials intent on thwarting the goal of this legislation. How easy it will be to camouflage a business meeting behind some non-business sounding announced topic. With no objective standard to determine what is a meeting "to conduct business" the ability for judicial review of agency abuse will, practically speaking, be non-existent.

2. Minutes vs. Verbatim Transcripts

The second amendment would permit the taking of minutes as opposed to the requirement of a verbal transcript at "closed" meetings. Minutes taken by the most competent of people are no substitute for comprehensive verbatim transcript. For example, particular monologue, dialogue or phraseology may at the time of the actual meeting seem inconsequential and consequently either

be omitted from the minutes or paraphrased. Yet later that very issue may be extremely important to affected persons. The participants and the public should never have to rely on minutes of the proceedings. If the issue is serious enough to warrant being discussed at a meeting, any discussion at that meeting should be transcribed. In closed meetings even more than open meetings there must be a check against inaccurate or incomplete minutes.

3. Transcript exemption

The third amendment would exempt SEC and the Federal Reserve Board from the transcript requirement.

4. SEC/Banking Agency Exemption

The fourth amendment would by generic description have the practical effect of excluding the SEC and banking agencies.

There is no logical or equitable reason for either amendment and the amendments are particularly offensive because they are new examples of the FED's consistent attempts to arrogantly transcend accountability.

Finally, we would like to emphasize our active support of an amendment which we understand will be introduced by you, Rep. Fascell. That amendment would require that at anytime there is a "deletion" from the transcript, there must be submitted a written statutory citation to that section of the law which would allow such a deletion. This amendment will ensure an additional measure of accountability into the bill.

Sincerely,

CAROL TUCKER FOREMAN,
Executive Director.
KATHLEEN F. O'REILLY,
Legislative Director.

Mr. HORTON. Madam Chairman, I yield 10 minutes to the gentleman from California (Mr. McCLOSKEY).

(Mr. McCLOSKEY asked and was given permission to revise and extend his remarks.)

Mr. McCLOSKEY. Madam Chairman, I do not want to belabor the time of the Committee in general debate on this matter on the specific amendments which will be debated more thoroughly later, but I would like to call the attention of the House to the fact that when we enact this legislation, as we will today, there is a particular duty on the House of Representatives to be careful in our craftsmanship, because this is another one of those instances where the Senate passed the bill unanimously by a vote of 94 to 0, without substantial debate on the floor. When the bill was sent to us, however praiseworthy and laudable its purposes, there were problems of craftsmanship which can plague our Government dearly in the years ahead if they are not recognized.

Consequently, unless several of these amendments are adopted, in my judgment, the bill may provide more problems than it seeks to solve. Let me try to set this in a historical context.

It was only 2 years ago that we enacted the Freedom of Information amendments, because of what we felt were the excesses in several administrations, culminating in the Nixon administration where the Attorney General at the time stated that if Congress wanted any information from the executive branch, they had an absolute right to withhold it and our sole remedy was impeachment, which we ultimately undertook. With regard to those excesses and abuses of secrecy by the executive branch, in the heat of anger and passion we passed amendments to the Freedom of Information Act in 1974, and then in 1975 we enacted the Privacy Act to try to protect individuals against excessive intrusion by the executive branch.

In both of those acts, we imposed civil or criminal penalties, or both against Government employees who might violate either privacy of the individuals or who might excessively claim secrecy for Government documents. We have not held oversight hearings by the subcommittee

which presents this bill on the actual operations of either the Privacy Act or the Freedom of Information Act.

I think, frankly, I would feel better about this legislation had we held oversight hearings on the problems for the executive branch which have been created by the Freedom of Information Act amendments and the Privacy Act amendments.

We know, for example, that both the Freedom of Information Act amendments and the privacy bill have imposed incredible new burdens of paperwork and complexity and additional personnel. We have a Paperwork Committee created by this Congress which is studying how to try to cut back on the paperwork and the complexity and the cost to Government to which we have added so substantially with the Freedom of Information Act amendments and the privacy bill.

Madam Chairman, briefly stated, this bill is founded on the proposition that the Government should, to the fullest extent possible, conduct the public's business in public. To that end, the bill requires all Federal agencies headed by more than one person to conduct their business in meetings that are open to all.

I want to make it clear that I have no disagreement with these principles. But, in my opinion, certain of the bill's provisions will, if enacted, needlessly, and even foolishly, interfere with the proper and effective functioning with the Federal agencies. I believe that the enactment of these provisions will end up hurting the people this bill is designed to benefit, by imposing on the Government costly redtape requirements which lower productivity while providing no benefits for anyone.

My differences with this bill are few but important. This bill can be significantly improved in the following ways.

VERBATIM TRANSCRIPTS

The bill in its present form requires a verbatim recording or transcript to be made of every meeting which is legally closed under the narrow exemptions contained in the bill. This is simultaneously the bill's most onerous and its most useless provision. It is onerous because of the tremendous expense involved in meeting this requirement—not only the costs of the recording equipment or stenographer, but the costs of transcribing the verbatim record, reviewing it to see if any portions of it can be made public, and, if so, making the necessary deletions in the transcript. It is useless because, under the act, these transcripts, made at considerable expenses, will never be made publicly available if the meeting was legally closed. Their only function is to serve as a policing aid to enable the courts to determine if the closing was proper. I think there must be a simpler, more efficient way to accomplish this goal.

This provision will undermine the goals of the two principal planks of Federal information policy, the Freedom of Information Act and the Privacy Act. If these transcripts are in existence, their disclosure will undoubtedly be the object of a significant amount of Federal court litigation. One way or another, some of the information in those transcripts will become public—and the protections provided for individuals contained in the Privacy Act, and for various types of exempt matters in the Freedom of Information Act, will be eroded. Thus, sensitive agency discussions—which the bill recognizes should not be held

in public—would be subject to being recorded in full, and the publication of an edited transcript. Those who will benefit most from this, I am afraid, are the special interests who can well afford to pay their agents or lobbyists to attend every open meeting and pore over every transcript of closed discussions made available.

I believe that the unnecessary transcript requirement should be deleted. Instead, agencies should be required to maintain minutes of closed meetings. These meetings will set forth the matters discussed at a closed meeting, and will enable a court to determine if a meeting was improperly closed. If it was, the court will have every power in equity at its command to remedy the situation in the manner it believes is required.

DEFINITION OF MEETINGS

This bill is directed not only at formal meetings of agencies convened to conduct agency business—which I believe are the legitimate subject of this legislation. Rather, the bill broadly extends its coverage to any "assembly or simultaneous communication concerning the joint conduct or disposition of agency business by two or more" members of the agency.

This language, together with the verbatim transcript provision, would mean that any assembly or simultaneous communication concerning agency matters, whether or not its purpose is to conduct business, would be subject to prior public notice, the open meeting requirement, and the requirement that a recording of the meeting or conversation be made.

In other words, all telephone conversations and meetings of agency members at barbecues, on the golf course, or anywhere would be covered by the act if the conversation included the mere mention of any matter pending before the agency.

A more important objection to this provision than the fact that it may interfere with some agency members' social lives, however, is the fact that this provision vitiates one of the most important exemptive provisions of the Freedom of Information Act, the exemption for intraagency discussions. Congress and the courts have long recognized the need for agency personnel to discuss, in private, regulatory matters and to freely explore all options that may be open—without the fear that those discussions will one day be publicly revealed. The heads of multimember agencies have this need as well as the members of their staffs.

I believe that the bill should apply whenever agency members convene in a formal meeting for the purpose of passing upon matters before the agency. It should not apply if the agency members meet informally, not for the purpose of voting or deciding matters, but only for a preliminary discussion among themselves of the important issues they will ultimately have to make an informed judgment upon.

ENCOURAGEMENT OF UNDUE LITIGATION

As I noted, the "sunshine" bill has a laudable purpose. But I think we all also perceive a need to try to cut the cost of Government and, in particular, to cut the need for mountains of paperwork. In addition, we are beginning to perceive a need to discourage undue litigation in the Federal court system. The benefits of open Government

which the bill achieves are sharply offset by the costly, and unnecessary, burdens it places on the Government and on the Federal court system.

This act provides that any person—not merely one interested in the matter before the agency—can bring an action to challenge the closing of a meeting. That suit can be brought in the plaintiff's home district, regardless of the place the agency is located or the meeting was held. Obviously, one closed meeting could be the subject of challenge in any number of districts, necessitating extensive travel by Government lawyers to litigate these challenges. The burden of proof is always on the agency, and as agencies have discovered in Freedom of Information Act litigation, that burden is a difficult one to meet. Finally, if in the opinion of the court the plaintiff merely "substantially prevails," he is entitled to an award of attorney's fees and costs.

This act will be a drain on the manpower and monetary resources of the Department of Justice and the legal staffs of the agencies that will have to resist these suits. These provisions will be a bonanza for the legal profession and—more importantly—for the special interests who can afford to hire them to delay, impede, and obstruct the processes of the regulatory agencies.

I am aware that the object of this bill is to make Government open to the people, and there may well be some action taken by public interest groups to force open an improperly closed meeting. But, by and large, the ones who will be taking advantage of this bill's provisions will be corporate and other special interests attempting to stave off what they deem to be unfavorable Government action. We have seen too many cases where agency action was unnecessarily protracted due to long, drawn-out court battles. This bill gives the special interests just one more forum in which to fight the agency.

The right to file suit under this bill should be limited to actions brought by a person aggrieved by agency action taken at a closed meeting—the standard which has governed access to the courts for review of agency action since the enactment of the Administrative Procedure Act in 1946. It is unwise to throw the courts open to anyone, anywhere, who is of a mind to throw a wrench into the workings of the Government.

CONCLUSION

We must remember that the Federal agencies have been created by the Congress, and given the job of promoting goals deemed by the Congress to be of utmost importance. Thus, when we impede the agencies, we only harm our own legislative objectives.

I am aware that criticism may on occasion be justifiably leveled at some agency action. But the answer to that problem is for Congress to address and correct the agencies when they go astray, not to obstruct, indiscriminately, all agency action of every kind.

I think we make a mistake when we try to saddle the agencies with onerous and unnecessary burdens such as the verbatim transcript provision of this legislation, when we erode the protection previously afforded for closed discussions of important policy matters by agency heads and staff, and when we subject them to harassment by burdensome litigation. Who will benefit? Will we protect the man for whose benefit an agency is attempting to devise a protective rule in accord with congressional direction, or will we merely provide a means for the

interests that would be affected by that rule to impede the effectuation of the will of Congress?

I would like at this time to ask a question of the gentlewoman from New York. If we pass the sunshine bill today, which in effect adds section 552b to the code, the Freedom of Information Act being 552 and the Privacy Act being 552a, may we not soon have an oversight hearing, within the next year, on the workings of the Privacy Act and the Freedom of Information Act?

Ms. ABZUG. If the gentleman will yield, I think there is no question about it.

While I have the opportunity to answer the gentleman on the Sunshine Act, I would remind him that most of the hearings we have had, or a good number of them, have dealt with oversight of the Freedom of Information Act and the Privacy Act.

On the question of information that is being provided or not being provided under the Freedom of Information Act, questions have come up concerning the application of the Privacy Act and what was required of the Members of Congress in order to get information for their constituents.

We held significant meetings with relevant agencies concerning some of the paper work and the bureaucratic interpretations of this Act, and we continued to hold hearings regularly to deal with the implementation and interpretation of the act.

The gentleman can be assured that this committee and its successor, because it is charged with the responsibility, will have oversight, and I know it will conduct oversight hearings on sunshine.

Mr. MCCLOSKEY. If I may respond to the gentlewoman, I do not want to be misinterpreted. I have commended the gentlewoman on the vigor with which she has approached the Freedom of Information Act amendments and the abuses of it, the oversight of the Privacy Act and the abuses of it. But my concern is oversight on the complexity and the cost to Government. It was not appropriate until now that we do this on the Privacy Act because the Privacy Act would have been in effect only a year in September. But we hear rumblings from many agencies. They have all indicated that the cost to the Government has become extremely burdensome, and that the complexity of government operations has increased tremendously.

Ms. ABZUG. If the gentleman will yield further, I think the gentleman makes a valid point. I think an act such as this, which involves privacy, the Freedom of Information Act, and now this Sunshine Act, which involves agencies of Government and the operation of very important functions, should at a certain point, when we have collected the information, be the subject of intensive oversight. I would certainly recommend that and see that it takes place.

Mr. MCCLOSKEY. I thank the gentlewoman.

Madam Chairman, I would like to speak briefly on the amendments which will be offered, because I think these amendments are crucial to producing a craftsmanlike bill.

On the first amendment, on the question of meetings, I would ask my colleagues to consider whether we in the Congress could operate with the definition of "meetings," as it presently exists in this bill. The definition of "meetings" in the bill, as it exists now, means if another Member and myself were to meet on, say, committee business, if we were to meet in the well of the House, if we were to meet at the lunch counter

or if we were to meet in our offices and discuss the subject of a pending bill, we would have to have a transcript of that meeting and it would have to be promptly produced for the public unless it came within one of the specific exemptions, and we would have to vote on the specific exemptions. This prevents discussion of matters in casual contacts amongst each other.

I think this should be amended. If we look at congressional procedures in the same context, we would preclude the executive branch from doing something we would never consider precluding for ourselves.

Ms. ABZUG. If the gentleman will yield, I want to point out that the gentleman's fear in this connection is not completely carried out. Unless there is a quorum of this agency, there would be no requirement such as the gentleman describes. It would not constitute a meeting under the statute or under the legislation as we now propose it.

Mr. LONG of Maryland. Madam Chairman, will the gentleman yield?

Mr. MCCLOSKEY. I yield to the gentleman from Maryland.

Mr. LONG of Maryland. Madam Chairman, I might point out that under the practices of the Committee on Appropriations, ordinarily two members constitute a quorum.

Mr. MCCLOSKEY. This is my problem, Madam Chairman. Let us take my own subcommittee, which has seven members. Assuming that four members constitute a quorum and that four of us should meet in the well of the House to discuss problems we have on a bill, that might well constitute a meeting which would then require a recorded transcript.

Mr. ABZUG. Madam Chairman, if the gentleman will yield further, I would rather not interrupt the gentleman's presentation, except that I do want to clarify this point. The quorum that the gentleman referred to is for the purpose of conducting a hearing and not for the purpose of doing business. I think there is a distinction there, and I do not agree with the gentleman.

I do not want to interrupt the gentleman on this point any further except to make the record clear from a legislative point of view. I think we ought to be clear as to what that means.

Mr. MCCLOSKEY. Madam Chairman, we have a disagreement, and it is worth stating and worth debating and worth resolving today. I would point out that much of the argument for this sunshine bill has been on the basis that in many cases enlightened States have adopted sunshine bills.

However, as to this meeting requirement, in my State of California there is no requirement for a casual meeting between a number of people who ultimately can conduct business for a city council or board of supervisors that they have to supply a recorded transcript or have a vote, and there is no requirement. I think we are searching here for balances so we can assure good operations in Government after we have had several decades of abuse of power by Government. We ought to recognize, however, that in the future members of a commission will not be of the same attitude of past members whose abuses we cure here.

We seek for a balance. We are going to have to get good people to serve on the commissions and to govern this country ably.

Frankly, if I were asked to serve as a commissioner under these rules that exist in the bill today, I would ask myself twice whether in the ordinary course of conducting Government business I could comply with these provisions of meetings and furnishing verbatim transcripts and still do my job honestly.

Madam Chairman, I will reserve the balance of my time now and save it for argument on the specific amendments.

Mr. FLOWERS. Madam Chairman, I have no further requests for time, and I reserve the balance of my time.

Mr. MOORHEAD of California. Madam Chairman, I yield such time as he may consume to the gentleman from Ohio (Mr. KINDNESS).

(Mr. KINDNESS asked and was given permission to revise and extend his remarks.)

Mr. KINDNESS. Madam Chairman, like many other Members of the House, I find that I am in a somewhat anomalous situation with respect to this bill. Here we are again, a small, closely knit group, sitting here in an interested manner debating in a stimulated way a rather important bill. Only a few of us are here, and this is going to affect all of us in some degree.

However, we have here a proposal before us that all of us, I think, can readily agree will aim in the right direction, toward providing openness in the conduct of public affairs. Naturally, we have some disagreements concerning some aspects of the bill. They have all been pointed out at this time, I believe, and I would like to express my support for the concept of this bill.

However, there is a problem, as the bill is now written, because it is my feeling that there are certain governmental functions that by their very nature have to be kept privileged or not published. In fact, the very functions carried out by certain Government agencies, the Federal Reserve Board being one of the prime examples, require a sequestered or restrictive setting for the conduct of their deliberations.

Following the conclusion of general debate, this House will have an opportunity to vote on the amendments that have already been discussed, and yet I would like to emphasize one amendment, and that is the one which would change the definition of "agency."

Most notable among the agencies that might be covered and will be covered by this bill for the Members' special consideration, I think, is the Federal Reserve Board. Similarly, however, the Securities and Exchange Commission has some peculiar considerations for the Members to look at.

The Federal Reserve Board's deliberations on monetary policies often involve sensitive subject matter. If such deliberations become totally open to the public, financial markets may react in some cases dramatically; and the stability of our economy is likely to be affected in some degree.

Madam Chairman, I would just like to point out something by way of quoting from a May 6 letter from Arthur Burns, the Chairman of the Board of Governors of the Federal Reserve System. He states:

> It is our belief that the Federal Reserve Board is unique among Government agencies insofar as the subject matter of its decisional process is concerned. With few exceptions, each of the Board's regularly scheduled meetings is involved with matters the sensitivity and intricacy of which, if exposed to public discussion, could lead to misunderstanding, misinterpretation, and disruptive and harmful speculations. Examples include deliberative processes in monetary policy formulation; receipt, transmission and evaluation of national and international market information; and, incident to the formulation of bank regulatory policy, discussion of confidential appraisals, and sensitive judgments relating to member bank and/or bank holding company operations, individuals, etc.

Ms. ABZUG. Madam Chairman, will the gentleman yield?

Mr. KINDNESS. I yield to the gentlewoman from New York.

Ms. ABZUG. Madam Chairman, I wonder whether the gentleman from Ohio (Mr. KINDNESS) is aware of the fact that all of the subjects that he has mentioned come within the exemptions in the bill. We had in the Government Operations Committee and in the Judiciary Committee extended discussion on this issue, and what we did in the way of exemptions more than covers the gentleman's concerns.

Mr. KINDNESS. I do not choose to yield further on the point because I have the bill, I have read the bill, and I understand what is contained in the bill. I think we could carry this dialog on into several other sections of the bill so as to modify the effect of what the gentlewoman from New York points out.

Ms. ABZUG. If the gentleman will yield further, I wish to point out that we share his concern and the concern of Chairman Burns on this issue.

This legislation provides adequate protection for those concerns, particularly in exemptions 8 and 9 of the bill.

I might also point out that when we passed the Freedom of Information Act back in 1966, the Federal Reserve expressed similar concerns:

> Could leave exposed to indiscriminate public demand certain critical records and materials related to the Board's credit and monetary policy functions as well as other statutory directed functions. Such as a result could impair the Board's effectiveness both as an instrument of national economic policy and as a regulatory body.

This was said by the Chairman of the Board in 1966. This has never happened, and Mr. Burns admitted that when he testified before my subcommittee.

I merely quote it to the gentleman to allay his fears.

Mr. KINDNESS. Madam Chairman, I thank the gentlewoman from New York for seeking to allay my fears, but the attempt fails.

The Federal Reserve Board furthermore, in addition to what has already been read, often has before it detailed financial and managerial information.

The Securities and Exchange Commission often has similar information before it; and those two comprise, I think, probably the most serious questions before us, as to what should be the coverage of this bill.

Mainly, Madam Chairman, I think our concern should be: Just what is it that we are doing?

I think oftentimes we have measures before us that have wonderful titles, that sound good, and gain all kinds of support; but contained within those bills are provisions that make it very difficult to support the entire content of the bill.

Madam Chairman, when we go about providing for Government in sunshine, I might state that there was no answer given in the subcommittee on it in the Committee on the Judiciary itself, in considering this matter, to the question: Why not include all of the executive branch, the departments of the executive branch of the Government, in this Government in the sunshine bill instead of the collegial-headed agencies?

Obviously, the answer has to be that this was a simple formula approach. Collegial agencies only being included, gives us a starting point, but we do not really know how many are really included within the scope of this bill and thus list exactly the agencies we want to cover. As a starting point I think that this is far better than the

broad approach that can give us so much trouble as to the question of which agencies and commissions are actually covered.

A further example, which will be brought out during the debate on the amendment is the Commodity Credit Corporation in the Department of Agriculture. Anyone who was to think about it and looks up the law and statutory provisions concerning the Commodity Credit Corporation, will soon discover that the Secretary of Agriculture actually directs the operations of that board. So it is an open question right off the bat as to whether the Commodity Credit Corporation is covered by this bill. Yet it is listed in the Senate report as typical of those agencies that would be covered by the bill.

I assure the Members that the interests of the American people are not best served by having Government in the sunshine litigated but rather by having Government in the sunshine.

Ms. ABZUG. Madam Chairman, I yield such time as he may consume to the chairman of the Committee on Government Operations, the gentleman from Texas (Mr. BROOKS).

Mr. BROOKS. Madam Chairman, I want to thank the gentlewoman from New York for yielding me this time.

(Mr. BROOKS asked and was given permission to revise and extend his remarks.)

Mr. BROOKS. Madam Chairman, this bill is hardly new or surprising. Here in Congress we have become used to operating in the sunshine. Nearly every State has opened its governmental processes to some degree. What is surprising is that we have taken so long to extend this worthwhile practice to the executive branch, and that some of the people there still resist it.

I would like to commend the chairwoman and members of the Subcommittee on Government Information and Individual Rights for the excellent job they did on this bill. It has been carefully considered by two subcommittees and two full committees. All interested parties have had a chance to express their views. As a result, the bill strikes a careful balance between the right of the public to know what its Government is doing, and the need to protect the rights of individual citizens and to assure that the Government's ability to function is not impaired.

When Government actions are taken in secret behind closed doors, we not only undermine public confidence in Government, but we can wind up pretty far off target and without the public support our Government needs if it is going to stay in business.

H.R. 11656 should help avoid those possibilities. By opening up the meetings of some 50 Federal agencies, it will assure there is public understanding of the actions of those agencies.

If the public understands and sees what goes on, it is more likely to accept and have confidence in our actions. Opening up those meetings will also assure that the officials of those agencies are accountable for their actions. That is what government of the people, by the people, and for the people is all about.

Certainly there are occasions when meetings should not be open. H.R. 11656 recognizes this and provides for closing them in those situations. It affords protection for trade secrets and information that could be damaging to financial institutions or to stock exchanges. It prevents invasions of personal privacy and guards against disclosure of crime investigation records. National security is also protected. Those safeguards that are needed are provided.

But what H.R. 11656 really safeguards is the public interest. It reinforces the basic constitutional premise that this is a government of the people, and that those who serve it should be fully accountable to the people for their actions.

Former President Harry Truman is justly noted for saying, "If you can't stand the heat, get out of the kitchen." I would add that if you cannot stand the light, get out of the Government.

Mr. HORTON. Madam Chairman, I yield such time as he may consume to the gentleman from Texas (Mr. COLLINS).

(Mr. COLLINS of Texas asked and was given permission to revise and extend his remarks.)

Mr. COLLINS of Texas. Madam Chairman, the most capable individual in Washington is the person who gives the names to our congressional bills. There is a warm and friendly spirit in the name "Government in the sunshine." But before we rush into this legislation, we should carefully evaluate all that it entails.

There are very few individuals in the administrative groups of Government who have the courage to say things in open meetings that they would say behind closed doors. This applies especially to funding. The pressure group with its key members sitting in the front row will always get more money than will an unrepresented group who might have a more worthy cause.

Last October a bill was passed here in Congress which is hard to understand. It provided for double pensions for a group of 40,000 National Guard technicians. They will get both military and civil service pensions. This bill was opposed by the Defense Department, the Civil Service Commission, the National Taxpayers Union, and the administration. Yet, in spite of a strong fight, the bill passed Congress by 261 to 117.

This bill should have been killed in committee. We created a $1 billion deficiency against an already deficient civil service pension plan. National Guard technicians will now be getting a double pension check whereas a four star general is only entitled to enter one pension plan.

Just as in Congress, where much of this wasteful spending should be eliminated at the committee level behind closed doors, we find the same thing in these agencies. When they talk frankly among themselves, they use more common sense. When they talk in front of the press, the television, and the pressure lobby groups the administrators have ears sticking out in both directions, and human nature will have them reacting to the pressures of whatever outsiders are present. From the days of Rome, history has shown that a republic which becomes overresponsive to every voter handout request is a republic that is sure to fall.

This bill invites aggressive lawsuits from every lawyer who has time on his hands. I recall a case here in the District of Columbia 2 months ago in which Judge Joyce Green ordered the District of Columbia government to pay an attorney, Gilbert Hawn, Jr., the amount of $168,487 for his work in suing the city to overturn its system of real estate tax assessments. This good attorney managed to find yet another way to confuse an already bankrupt city, and for this service he was paid this exorbitant fee.

I can well understand the enthusiasm of the gentlewoman from New York (Ms. ABZUG), in leading the fight for this "sunshine" bill. How-

ever, I would compare the problems developed here with her own New York City which has too much sunshine in its legislation and not enough closed door sessions to work out the fiscal restraints needed in the governmental functions.

We are already too overcommitted with overspending in this country. When President Kennedy came into office, the budget was $97.7 billion. We are now talking about $415 billion. But even more than the fact that we are spending four times as much, we are running a $100 billion deficit.

I do not see how these agency officials of our Federal Government could effectively and conscientiously administer the executive decisions with the hubbub and hassle of press and pressure groups on hand. Sometimes administrators like to ask questions for information to broaden their viewpoints, but even a question can be misinterpreted on a public print basis.

I am always amazed at how we in Congress establish one set of rules for everyone else, and yet think we should live according to a different set of rules ourselves. I serve on the Commerce Oversight and Investigations Committee where I am the ranking Republican. Recently, the chairman and the majority insisted that confidential records taken from the Securities and Exchange Commission files be made public. These records consisted of investigations which were being reviewed and were pending a decision. This information had been brought to the SEC on a voluntary basis and my own personal opinion is that the matter did not warrant any public statement from the SEC. While the SEC was keeping the matter under advisement, and reviewing all of the facts, we subpenaed the information and our chairman released it to the press. One immediate effect of this is going to be that it will be very difficult in the future to obtain voluntary disclosures. These companies came forward asking whether they had done anything wrong, and brought in all of the facts and information for an opinion and judgment. But public disclosure is often interpreted by the public in the same manner as an indictment might be interpreted.

Let us look at our own Oversight Committee in Commerce, to which I referred. This committee has 35 members on its staff. They are not appointed by Civil Service, but are appointed entirely and exclusively, subject to hiring and firing, by the chairman of our committee. They are his private staff. We have a rule written by the committee majority that limits any staff member representing the minority from ever seeing the raw material in investigation files. The attorney that represents the Republican side in this committee is not entitled to see any of the raw material as it is being developed and studied by the staff. Furthermore, a Congressman who himself might go in to review the records is not allowed to photostat any of this material to take back for our staff to analyze and study further.

Here is an Oversight and Review Committee that is responsible only to the Majority, and will provide no information to the minority staff. Here is a committee of Congress which is assigned the responsibility of oversight and investigation which works behind closed doors. The chairman of our committee is the author of the Freedom of Information Act.

I feel this way about all of this "sunshine in the Government." There are many in Congress who believe that all the facts should be made public except those that they are personally handling in their own com-

mittee. This sunshine bill is one of the most unnecessary bills to come before Congress this session.

Mr. HORTON. Madam Chairman, I yield such time as he may consume to the gentleman from Connecticut (Mr. SARASIN).

(Mr. SARASIN asked and was given permission to revise and extend his remarks.)

Mr. SARASIN. Madam Chairman, to enumerate the myriad problems confronting us as a nation today would merely be repetitive of everything we are seeing and hearing from our constituents and from the newspapers and television. We have gone from an agrarian, family based society to one that has become highly urbanized and mechanized with different sectors of the society dependent on the other to meet their various needs. We realize that none of us can any longer operate independently. Problems have become too large to be solved on the individual, local, or State level and the Federal Government has become the intercessor to provide needed assistance to resolve these problems.

Government, in large part, has grown as a response to these problems and to act as an arbiter, regulator, and administrator of the problems which people face but cannot solve on their own. Governmental resources are vast, just as the manpower involved in allocating and using these resources has created a large Federal bureaucracy. The problems we face today are inherently more complex than those faced by our ancestors 200 years ago.

Our problems have evolved from the technology and innovation which we have created to make our lives more comfortable. Therefore, we have entrusted to Government agencies the decisionmaking authority to identify and approach these problems—be they environmental, energy, social, or economic. Yet most of these day-to-day agency activities and decisions are removed from public view. Just as our problems have a continually changing face, so must our approaches to finding solutions. Our national goals, our programs and governmental policies must be reshaped and made responsive to these variable conditions.

The Federal Government continues to control many aspects of our daily lives. We are never totally free from the purview of Government. But just as our American Government was created as a Government of the people, so must it remain. The growth of the bureaucracy has led to a protectiveness and secrecy about certain governmental actions. Those in control often forget that their mandates come from the people and it is to the people that they must remain responsive.

The need for open Government has become increasingly apparent through revelations of misuse of Government power, abuse of authority, and infringement of individual rights. This bill would be a major step toward avoiding these kinds of improper activity in the future by opening up these activities to the cleansing light of public visibility.

Open Government would have multifaceted benefits. Citizens would be educated into how Government operates. More importantly, individuals would have the opportunity to review the governmental decisionmaking processes which related directly to their everyday lives. Public policy should be open to public scrutiny. The particularly bill which we are debating today, H.R. 11656, would go far in increasing an intelligent understanding of American institutions and how they operate. Although I have difficulty with some portions of the bill, I believe that

one of the essential principles of a free government is the right of the people to know how their Government makes decisions.

Although Congress has a reputation for excluding itself from the requirements which it imposes on other government agencies, especially those of the executive branch, we, too, have acted to open our meetings and hearings to public oversight. It is just this sort of public scrutiny which makes Federal Administrators more responsive to the demands of the American public.

In addition, I favor the safeguards written into the bill, providing protection relating to matters of individual privacy, national security, and financial disclosure. The bill would protect the rights of individuals and the ability of the Government to carry out its responsibilities.

I agree with Thomas Jefferson that effective self-government requires that the people participate in every feature of the political process. The American public has a right to participate in the execution of the laws passed by Congress. Government in the sunshine is a further step in the direction of opening our political processes to public participation.

Mr. STEELMAN. Madam Chairman, it is a pleasure for me to speak today in support of H.R. 11656, the Government in the Sunshine Act. This legislation is the logical result of our realization that we must open up the doors of our Government to public scrutiny. We must allow the people to view the process of decisionmaking to increase understanding, dispel cynicism, and provide access to information vital for an informed citizenry. To deny the public the right to know not only breeds distrust, but, in fact, theatens the basic idea inherent in and crucial to our democratic form of government.

The "sunshine" bill represents a logical extension of legislation passed by Congress over the last decade designed to give the people the right to know.

We first concerned ourselves with the problem of secrecy in government in 1955 by creating a special Subcommittee on Government Information. The investigative and legislative hearings of this subcommittee contributed significantly to the enactment of the Freedom of Information Act. In March 1973, we adopted House Resolution 259 which required us to open up House committee deliberations to the public. Furthermore, on November 5, 1975, the Senate adopted a resolution which allows public observation of the markup sessions of Senate committees. Despite these efforts, though, too many doors remain closed.

The bill we have before us today will establish a policy of openness for approximately 50 multimember agencies. It requires a majority vote in open session to close a meeting, and then only if certain exemptions apply.

It is significant that the definition of a "meeting" in this bill not only covers sessions where formal action is taken, but also those at which a quorum of members deliberate informally regarding the conduct or disposition of agency business.

It is significant that there is a presumption of openness and that a majority vote by the entire membership is needed to close a meeting or any portion of it.

It is significant that any citizen can challenge in court the closing of a meeting or any violations of the openness requirements of the bill, and that the burden of proof of the propriety in closing a meeting rests with the agency in question.

Another important provision of this bill establishes for the first time statutory prohibitions on ex parte communications with agency members.

In considering "sunshine" legislation, we must remember that public awareness of the processes of its government is essential to maintain an effective democratic form of Government. James Madison wrote:

> A popular government without popular information or the means of acquiring it is but a prologue to a farce or both. Knowledge will forever govern ignorance. And a people who mean to be their own governors must arm themselves with the power knowledge gives.

It is a contradiction in terms to think we can have a democratic Government without an informed public. Particularly with the increasing size of government, we must allow the people to review not only the decision, but the decisionmaking process.

H.R. 11656 is one way to handle the crisis of distrust of government that is rampant in our country today. It may not be a panacea for the problem, but it can aid the restoration of confidence so vital to our Nation's health. The time for "sunshine" is here, and I urge all my colleagues to join me in supporting H.R. 11656.

Mr. ASHLEY. Madam Chairman, I am thoroughly in accord with the principles embodied in the legislation before us today, H.R. 11656, the Government in the Sunshine Act. Passage of this measure will go a long way toward assuring accountability on the part of Federal agencies and increasing public knowledge of and participation in the official proceedings of their Government.

In brief, the bill requires all meetings of Government bodies headed by more than one person to be open to the public, with certain exemptions where such matters as national security and informative trade secrets are involved. The measure thus closely parallels and supplements the Freedom of Information Act in giving the people of this country greater access to the records of official Federal proceedings than has ever been allowed by any government in history.

There are however two provisions in the bill which could prove to be patently unworkable, possibly even mischievous, and I will support amendments to these sections in the interest of passage of a reasonable and practical piece of legislation.

First, H.R. 11656 requires that not only formal meetings be open to the public, but also that any assembly or simultaneous communication concerning agency business by a specified number of agency officials would be subject to prior public announcement, to the open meeting requirement, and to the requirement for a formal vote for closing of the meeting. The broad sweep of this language would make the bill applicable to social gatherings, conference telephone calls, and even the most casual conversations of agency officials bearing on their duties regardless of whether or not their communication was arranged for the specific purpose of conducting public business. This provision appears to me to go far beyond what a desirable and practicable sunshine law should include, and I support the proposed amendment to limit the bill's coverage to only those meetings called for the explicit purpose of discussing agency business.

My second objection is to the requirement that a verbatim record be kept of every meeting which is legally closed under the exemptions outlined in the act. The further requirement that these transcripts be

made available to the public threatens to open up to public scrutiny information relating to trade secrets, medical and criminal records, national security, and other topics which the Congress has already seen fit to exempt from the provisions of the Freedom of Information Act. No State sunshine law contains such a requirement, and I believe that its retention in the bill will open us up to serious charges of invasion of privacy and failure to protect a wide range of privileged information. It appears to me that the keeping of minutes of the closed meetings in these areas will be sufficient, in the event that those records are ever needed for any court action or congressional oversight. Consequently, I support the amendment to delete the requirement for verbatim transcripts and believe that we will have a stronger bill thereby.

Mr. LEHMAN. Madam Chairman, recent public opinion surveys indicate that the confidence of the American people in our government is at its lowest point in years.

Today, the House is considering legislation which if enacted will open up the operations of government to the public and be of great assistance in restoring the trust of the people in government. I am referring to H.R. 11656, the "government in the sunshine" bill.

For too long, the Federal agencies which have come to govern and determine so many aspects of our lives, have been conducting business without being required to operate in full view of the people for whom they exist. In my view, this tendency toward secrecy has produced an unresponsive bureaucracy and caused the alienation of the American people from their government.

The "government in the sunshine" bill would require for the first time in history, that this practice by governmental agencies cease. With the adoption of this legislation, meetings and actions of these agencies would be subject to the scrutiny of the American people. Of course, certain exemptions have been made; aspects dealing with national security, matters under the privacy acts, the judicial areas and some regulations dealing with financial institutions.

This legislation has been carefully considered. It was approved by a vote of 94–0 in the Senate. I believe this House should pass this bill and in so doing, take a necessary step in the restoration of a responsible and effective government, as well as the restoration of confidence by our citizens in our Government.

Mrs. COLLINS of Illinois. Madam Chairman, I rise in support of H.R. 11656, the government in the sunshine bill which is before the House today.

As my colleagues know this bill, which is the product of many months of diligent work by members of several committees of the Congress, simply seeks to create greater public access to business meetings conducted by the Federal agencies.

It is no secret that Federal agencies do much to affect the lives of the citizens of this land and it is also no secret that the citizens have little opportunity to observe firsthand the workings of those agencies which so often influence their lives. I believe that this bill will provide a very good opportunity to change this present circumstance. In my view H.R. 11656 by providing greater public access, will provide greater government accountability.

However since we sometimes hear of instances of a good and simple idea when it is reduced to legislative form turns into a problematic

restriction on government and its people, it is wise to point out that the Government in the Sunshine bill has been developed with careful consideration and, consequently does not fall in that potentially problematic category. On the contrary, H.R. 11656 represents a balanced approach to a legislative issue that encompasses both the public interest and the business bureaucratic interest.

Evidence of the balanced approach taken by this bill is seen in its provision that permits agencies to close their gatherings to the public if the content of a meeting would contain information that it is not best to widely publicize. Such areas of information are accounted for in specific "exemptions" contained in the bill. These exemptions include diverse matters affecting national security, financial institutions, trade secrets, agency personnel proceedings, and other sensitive areas. The bill consequently guards against the indiscrete discussion of private or highly critical issues. This is a reasonable approach. Yet in requiring that portions of a closed meeting, in which nonexempted material is discussed, must be recorded for public review after the session is concluded the bill shows ample concern for the government process and the public interest.

A further illustration of the balance in this bill is displayed by the nature of meetings that are to be covered under this measure. A meeting for the purposes of this bill will, broadly speaking, be an assembly or simultaneous communication between two or more people concerning the conditions or deposition of agency business. The openness, as a result, applies to business sessions as well as formal decisionmaking meetings and does not cover "chance encounters" or "social events". This is again a realistic balance of the public interest in Government affairs.

Incidentally, in making a notification of the time, place and agenda of meetings available to the public, as H.R. 11656 does, the agencies would be complying, to a large extent, with the action the House of Representatives took several years ago to open its committee business and markup sessions to the public.

Madam Chairman, this bill amply protects the privacy of individuals without being disruptive of the process of Government, and still advances the public's interest in knowing what its Government is doing. It has sensible limits and achieves more openness in our Government. The cost estimates surrounding the bill are modest. It is estimated that over a 5-year period approximately $800,000 would have to be expended to make this bill operational. There are few in this Chamber that would argue this is too high a price to pay for opening the government process to citizens' review and observation.

I am urging support of H.R. 11656 as reported by the committee. I wish to remind my colleagues of the words of James Madison:

> Knowledge will forever govern ignorance, and a people who mean to be their own governors must arm themselves with the power knowledge gives. A popular government without popular information or the means of acquiring it is but a prologue to a farce or a tragedy or perhaps both.

A vote in support of the Government in the sunshine will, in my opinion, be a responsible vote to advance public knowledge without jeopardizing the government process.

* * * * * * *

Mr. BENNETT. Madam Chairman, I rise in support of H.R. 11656, the Government in the Sunshine Act. I am cosponsoring this sun-

shine legislation and I am glad that the House is on the threshold of approving the opening of meetings of agencies in the executive branch.

In a democracy, the people are the source of power for the government. The people have a right to know about the deliberations of their leaders on matters that can affect them either directly or indirectly.

My own State of Florida has had a sunshine law since 1967 and the much-publicized effectiveness of this law deflates the arguments that government functions best behind closed doors. Our Governor has remarked on many occasions that Florida's sunshine law has improved the working of government by providing for an open discussion of important issues.

The dawning of sunshine in the executive branch is simply a natural progression of openness on the Federal level. In recent years, both the House and the Senate have adopted new rules opening the great majority of committee meetings, including markup sessions, to the public. It is certainly time to extend this openness to the nonelected executive agencies.

Our Government was founded on the principle that ultimate power is vested in the people and that only an informed citizenry can properly exercise this power. In this, our Bicentennial Year, it is all the more fitting that the people have the opportunity to view the deliberations of their executive agencies.

Mr. HANNAFORD. Madam Chairman, I urge support of H.R. 11656, the Government in the Sunshine Act. One of the worst problems with the growth of the Federal bureaucracy has been the insulation of Federal agencies from public scrutiny. If successful in finding his way through the labyrinth of bureaucratic detours and referrals, the citizen's quest for information relating to Federal agency regulations too often ends with the discovery that the information he seeks is either legally protected from public examination or conveniently not recorded. Nor does the citizen alone suffer from this lack of accessibility: Our own everyday experiences remind us of the impenetrability of administrative agencies and their ability to frustrate congressional inquiries with a lack of documentation of administrative rulemaking.

The Government in the Sunshine Act restores public accessibility to agency proceedings, and this accessibility will hopefully check the departmentalization of Federal power into feudal executive directorates. The public examination of Federal decisionmaking will improve the national debates on Government policies and keep the public informed of decisions affecting them.

But most importantly, events of the recent past have given the public adequate reason to be distrustful of Government, and such distrust is destructive to a free society. Anything that we can do to restore faith in Government must be done. If the public wants to know what is going on behind closed doors, we must open the doors. If this on occasion diminishes our efficiency of operation, that is a sacrifice we must make.

Mr. MATSUNAGA. Madam Chairman, I rise to express my full support for H.R. 11656, the proposed Federal Government in the Sunshine Act. As a cosponsor of this legislation, I commend the chairmen of the House Judiciary and Government Operations Committees,

Hon. PETER RODINO and JACK BROOKS, respectively, for their substantial efforts to assure a fair bill and to bring it before the full membership of the House.

Madam Chairman, an excerpt from the Judiciary Committee's report on H.R. 11656 succinctly states the basic principle of our system of government which this bill seeks to insure. I quote:

> . . . (it) assumes that citizens have the right to know how their government operates and what the government is doing for them and in their name.

We all know how low public confidence in its government has sunk. We receive mail every day from constituents who suspect the "real motives" of a decision by various Federal agencies or elected public officials. We hear these same complaints voiced in angry, disgusted, or saddest of all, resigned tones when we return home. I believe that the reason this sentiment is so widespread is that people feel detached from their government. Because of government's increasing tendency to conceal its inner workings and because they are not able to perceive their role in the decisionmaking process, people begin to distrust their own government. They assume that they have no role, and the result of this conclusion is unavoidably a decrease in confidence in government.

As serious as this confidence issue may be, it is not the most dangerous consequence of secrecy in Government. This more serious potentiality was realized all too painfully in recent years in the numerous abuses of government known collectively as Watergate. The Fathers of our system, 200 years ago, knew why these abuses occur. They declared that secrecy breeds a lack of accountability, and nonaccountability breeds the breaching of human rights.

I therefore strongly believe that action by the Congress to reverse that recent trend toward secrecy in government will contribute immeasurably toward an elevation in public confidence and the increased protection of our constitutional rights. The bill before us today is a concrete, responsible step toward this end. While recognizing quite rightly that individual rights must be protected, and government must be assured the ability to carry out its responsibilities, it assumes that all U.S. citizens are entitled to know the reasons for all decisions of the executive branch of Government for which the need to limit access is not clear or totally justifiable.

Madam Chairman, in recent years I have joined several of my colleagues in actively supporting several proposals to open up the decisionmaking process of the legislative branch of Government to public scrutiny. I have initiated or supported wholeheartedly efforts to provide for full lobbying disclosure, for full financial disclosure by Members of Congress, for open committee meetings, for televising the proceedings of Congress, and for requiring record teller votes on key amendments. Congress has become stronger for these reforms, for by preventing the opportunity for minority interests to control the legislative process via concealment, the will of the majority has been assured its role as the crucial decisionmaking factor. It is time that we extend the same requirements of full public scrutiny to the decisions of the executive branch. I therefore commend the pending Sunshine Act to the House, and urge that it be given the overwhelming support which it so clearly deserves.

Mr. ANDERSON of Illinois. Madam Chairman, when the chairman of the Government Operations Committee (Mr. BROOKS) testified before

our Rules Committee on May 19, 1976, he explained that the purpose of this Government in the Sunshine Act was "to bring to the executive branch some of the sunshine we have been enjoying here in Congress for the past few years."

As the author of nine "Open House Amendments" which would truly bring more sunshine into the House and its committees, I was extremely interested in the chairman's statement and set about to determine just how parallel this "sunshine bill" is to our own House rules. Much to my amazement, though I guess I should not have been surprised given the fact that we tend to be tougher on the executive branch than ourselves. I found that this "sunshine" bill far exceeds any sunshine requirements which now apply to House committees. In effect, this bill establishes a double standard for sunshine between the two branches, and we come out as being the shadier of the two branches of Government.

Madam Chairman, this conclusion is based on an examination of the House Rules, the published rules of each of its standing committees, and a followup phone survey which my staff conducted. The results of this three-part sunshine inquiry and comparative analysis are shocking, to say the least. Let us go down the list of what this bill requires as compared to what is now required or practiced by our House committees.

OPEN MEETINGS

Section 3 of H.R. 11656, the sunshine bill, states that all portions of all meetings of Federal agencies headed by two or more individuals appointed by the President shall be open to public observation, and then goes on to list 10 narrow exceptions to that rule.

Clause 2(g)(1) of House Rule XI states that a committee meeting may be closed by majority vote for any reason.

On January 29, 1975, I introduced House Resolution 114 to amend clause 2(g)(1) of House Rule XI to require that all committee meetings be open to the public unless matters to be discussed would endanger national security, violate any law or rule of the House, or involves internal budgetary or personnel matters—roughly the same rule which now applies to committee hearings. My resolution now has 87 cosponsors and it is still languishing in the House Rules Committee.

VOTE TO CLOSE MEETINGS

Section 3(d)(1) of the sunshine bill requires a rollcall majority vote of the agency to close a meeting and "no proxies shall be allowed."

While clause 2(g)(1) of House Rules XI also requires a majority rollcall vote of a committee to close a meeting, clause 2(f) permits general proxies "for motions to recess, adjourn or other procedural matters." In other words, proxies may be used in House committees for the purpose of closing a meeting.

On January 29, 1975, I introduced Resolution 113 to ban all proxy voting in House committees. That resolution now has 91 cosponsors. It is still stuck in the House Rules Committee.

TRANSCRIPTS AND MINUTES OF MEETINGS

Section 3(f) of the sunshine bill requires that a veritable transcript be kept of all closed agency meetings and that all but protected portions

be made promptly available to the public and that copies be furnished to the public at no greater than the cost of duplication or transcription. Likewise, agencies are required to keep minutes of all open meetings and make these promptly available to the public, again providing copies at no greater than cost of duplication.

Clause 2(e) of House Rule XI requires each committee to "keep a complete record of all committee action" but only the "result of each . . . rollcall vote need be made available by the committee for inspection by the public at reasonable times in the offices of the committee." All other information "shall be the property of the House and all Members of the House shall have access thereto." In other words, unlike the sunshine bill, there is no requirement in the House rules that a verbatim transcript be kept of all closed committee meetings, let alone that it be made available to the public. And while, like the sunshine bill, our rules require that a complete record be kept of all committee action, only the rollcall vote portions of the minutes need be open to public inspection.

On January 29, 1975, I introduced House Resolution 112 to require that all committee records, except for information whose disclosure would endanger national security or violate any law or rule of the House, should be open to public inspection. That resolution now has 82 cosponsors and it is still gathering dust in the House Rules Committee.

Madam Chairman, our followup check of committee rules reveals that most are in conformity with the minimal requirements of the House rules, and not many have broader sunshine provisions. It should be noted, though, that most committee markup sessions are now open to the public. Moreover, many committees do permit persons to inspect committee minutes and copy them, though few committees provide a duplication service. Thus, actual committee practices are often somewhat more lenient than House or committee rules would suggest. Nevertheless, these practices vary greatly from committee to committee and presumably are subject to the dictates and whims of the committee chairman. Some committees will not even permit Members' individual staff to make Xerox copies of meeting transcripts which are open to public inspection, thus forcing time-consuming copying by hand.

Finally, it should be noted that all committees retain the sole discretion under clause 2(k)(7) of rule XI over the release of information received or discussed in executive session. Unlike the sunshine bill, they are under no obligation to make public the sanitized portions of such transcripts. And unlike the sunshine bill committees cannot be challenged in a court of law over their compliance with the various sunshine requirements.

Madam Chairman, as one who has long advocated more sunshine in the House, I think it is a bit duplicitous and hypocritical for us to impose more sunshine requirements on Federal agencies than we are willing to abide in our own rules and committees. If we are going to spread this sunshine around, let us do it in such a way that both branches are exposed to an equal amount of light and heat. I hardly think the argument can be made that the Congress is any less a public body than are the Federal agencies which are covered under this sunshine bill.

Mr. ANDERSON of California. Madam Chairman, I rise in strong support of H.R. 11656, the Government in the Sunshine Act.

In effect, this legislation ends secret deliberations by Federal agencies, except in the most sensitive cases. The provisions apply to 47 regulatory agencies that are covered by the Freedom of Information Act, and those headed by a body of two or more members, a majority of whom are nominated by the President and confirmed by the Senate.

I believe the words of Thomas Jefferson best summarize why I was pleased to add my name in cosponsorship of this legislation, Jefferson said:

> The will of the people is the only legitimate foundation of any government. I know of no safe depository of the ultimate powers of the society but the people themselves. Whenever the people are well-informed, they can be trusted with their own government, whenever things get so far wrong as to attract their notice, they may be relied on to set them to rights. Nothing then is unchangeable but the inherent and inalienable rights of man. I have great confidence in the common sense of mankind.

I urge your support for this legislation.

Mr. VANIK. Madam Chairman, I am pleased to speak in support of H.R. 11656, the Government in the Sunshine Act, a bill to insure that the public will have the open and responsive Federal agencies to which they are fully entitled. I particularly support section 552b(f)(1), requiring a complete transcript or full recording of each meeting, or portion of a meeting, which is closed to the public; and section 552b(f)(2), requiring that minutes be kept of open meetings and made available to the public.

I believe that H.R. 11656 will greatly improve the accountability of Federal regulatory agencies, whose decisions have the effect of law. However, I believe that Congress should demand the same openness of our own committees that we would require Federal agencies to have. As many Members of Congress are aware, I have been involved in a dramatic example of the need for openness in our own legislative conference committees.

The conference committees effectively act as a third legislative body, disassembling and redrafting the original bills of the House and the Senate. The final product can resemble a legislative Frankenstein for which no one wants credit or blame. The original intent of the bill can be perverted without a clue as to the source of the changes.

I specifically refer to the Tax Reduction Act of 1975, which became Public Law 94–12 with new language grafted onto section 907—language which had not been part of either the House or the Senate version of the bill. The result was the creation of an enormous tax loophole, primarily benefiting the four corporate owners of the ARAMCO oil consortium, to the detriment of the American public who lost $35 million in annual tax revenues.

I have previously described my efforts to determine the source of section 907(c)(3). My efforts were thwarted by the lack of meaningful records, as is often the case where closed meetings are held. The committee conference members, with only their personal recollections to go by, could not recall how the language responsible for the loophole became part of the law. No one could even recall if it had ever been discussed. Given the extreme pressure under which conference committees normally work—in a race against time to complete legislation before the close of Congress—it is only surprising that this sort of

mutation of legislation does not happen more often. The more complex a piece of legislation is, the more hopeless it becomes to account for any single change in its wording or intent without the availability of accurate records.

The arguments for requiring Federal regulatory agencies to hold open meetings with reliable records clearly apply with even more force to the conference committees who give our laws their final form. An agency ruling or decision having unanticipated and undesirable effects can be corrected with far greater speed and fewer complications than the product of a conference committee. Presently, a bill can become law before anyone has time to realize the harm that even a seemingly minor change in the wording can cause because only the end product of the committee work is readily available to Members who are expected to vote it into law. As was the case with the tax reform bill, there may be efforts by those who benefit from the unplanned loophole to enlarge it. I have introduced a bill, H.R. 13952, to repeal the questionable language of the Tax Reduction Act. However, my efforts to take up this legislation have not been successful thus far.

Open conference committee meetings would result in improved legislation. Furthermore, a recordkeeping requirement, as in H.R. 11656, would have the added benefit of providing improved legislative histories so that courts can interpret laws as Congress intends. Legislation has already been introduced to remedy the problem of the closed conference. The House should adopt the provision for open conference meetings already passed by the Senate as part of S. 5, together with recordkeeping requirements similar to those included in H.R. 11656. The public would then be protected from the abuses fostered by the shroud of secrecy beneath which conference committees are now free to operate.

Mr. LEGGETT. Madam Chairman, openness in Government must be a guiding precept of any true Democrat. I am heartened that it represents a plank in my party's 1976 platform and a major goal of our Presidential nominee. It is thus particularly timely for the House to take another major step toward fulfillment of that goal by passage of H.R. 11656, the Government in the Sunshine bill.

In considering this bill, we must look back to first principles. Ours is a Government by consent of the governed. If the people are to exercise their right and duty of consent, they must know. It is not enough that the people's representatives know, for the authority conferred on the Executive by the Legislature ultimately flows from the people. And, if Government is to be in reality the servant of the people, rather than the reverse, then Government must be fully accountable to a knowing public for its official acts.

Madam Chairman, the issue posed here is basically simple. The modern leviathan which the executive branch has become in the last 3 decades has become accustomed to doing its business largely insulated from the people. The question is whether we are going to take another needed step in the direction of reversing that trend.

We enacted the original Freedom of Information Act, with the goal of making documents of executive departments and agencies generally available to the public, in 1966. And in 1974, we passed the major strengthening amendments needed to translate that objective into reality.

The purposes of the bill before us are basically twofold. One is to open to the public the meetings of multimember Federal agencies, except for discussions which fall within 10 exempted areas. The other is to prohibit ex parte communications between agency decisionmakers and interested parties, so as to insure that agency decisions which are supposed to be based on a public record are not influenced by private, off-the-record communications.

The open meeting rule would apply to about 50 Federal regulatory agencies, to all others which are covered by the Freedom of Information Act, and to those which are headed by a body of two or more members, a majority of whom is appointed by the President and confirmed by the Senate. It is also explicitly made applicable to the Federal Election Commission and the Postal Service. I might add, as an aside, that the public will doubtless be interested, though hardly inspired, to learn how the moguls of the Postal Service arrive at some of their singularly effective decisions, such as the one to spend a billion or so on machines which speed up parcel post by the rip-and-shred method.

The 10 exempted areas parallel those covered under the Freedom of Information Act. They run the gamut from national security and foreign policy information, to accusations of individual criminal acts, and certain information on the regulation of securities, currency, and financial institutions. The bill requires that when an agency closes a meeting under 1 of the 10 exemptions, it must make a recording or verbatim transcript of the closed portion and release to the public all parts which do not actually contain exempt information. I might add that Dr. Arthur Burns, head of the Federal Reserve Board, who has been so receptive to congressional influence in monetary policy, opposes this bill because of the transcript requirement; but has admitted that all of his meetings on monetary policy and bank regulation could be closed.

I realize that there is much controversy surrounding the definition of those meetings which would be subject to the "sunshine" requirement, as well as the provision for transcripts of closed meetings. I say, however, that if we are to err, let us err for once on the side of openness. We have had a great deal of secrecy in our post-war Government. Why not try a whole lot of openness for a change.

In any event, let us not permit these issues to deflect us from the fundamental principle involved in this bill. We in the Congress have taken the big step of opening our committee and conference meetings to the public, including markup sessions in the House. There is no reason why we should expect any less of decisionmakers in the executive branch.

I urge my colleagues to support H.R. 11656 as another key step toward putting democratic theory into practice.

Mr. SIKES. Madam Chairman, let me begin by saying that I wholeheartedly agree with the objectives of this legislation. Coming from a State that pioneered "Government in the Sunshine," I feel also that I possess a broader view of the pitfalls that can await us if the legislation under consideration is adopted in its present form.

My study of the bill leads me to the conclusion that what we are doing in our zeal to open Government to the people, is creating a legal nightmare that can keep Government bogged down in an endless process of defending itself.

I call attention to four provisions of the bill that greatly disturb me. First. A lawsuit can be brought and the attorney fees and costs are guaranteed merely if the plaintiff "substantially prevails." Second. A plaintiff not only can obtain personal costs against individual members of an agency in certain cases, but costs cannot be assessed against him even if he loses, unless it can be proven that the lawsuit was instigated for purely frivolous and dilatory purposes. Think for a moment of the position of the dedicated public servant. I personally feel it would further hamper our efforts to obtain qualified persons to work for Government. Third. Perhaps the most indefensible provision of the bill is the one that allows a person to bring a lawsuit in his own home district against any agency covered in this act regardless of where that agency held the meeting.

These points alone will provide you with some idea of the legal nightmare we are creating.

In closing I wish to speak to a fourth provision that troubles me. That provision is the requirement that transcripts be kept of all closed meetings and be made available with proper regard for national security and other exceptions listed. While the intent is to provide the agency with a tool for defense in the event of lawsuits, it also provides a great temptation to those who would like to become instant heroes with the media. I think the House has proved conclusively that secrets are hard to keep.

Mr. MIKVA. Madam Chairman, over the past year, the lead horse of the team pulling almost every political bandwagon has been nourished by attacks on the Federal bureaucrats. During this period, there have been a number of constructive proposals put forward to improve the quality of the Washington agencies.

Today, we have the opportunity to move one of the simplest but, potentially most effective of those proposals, the "Government in the Sunshine Act," from the drawing boards of classrooms and committees into the boardrooms of our regulatory agencies.

Government in the sunshine is important not only for the substantive benefits it will provide American business and consumers, but also because the central concept of this bill is so closely tied into the central concept of democracy—the people's right to know. The failure of the Government to respect the right of the people to know is one of the primary causes of the erosion of public trust in Government. The Government in the Sunshine Act is an essential step toward the restoration of public confidence.

Public scrutiny of the agency decision-making process is not a mere cosmetic solution. The exposure of errors and inequities in agency decisions will substantially reduce the frequency of occurrence. But, increased public scrutiny also means a greater awareness by the public of the many fair and judicious opinions promulgated by agency commissioners.

The House of Representatives has recently brought some of its procedures into the sunshine; I urge my colleagues to seek as much from the regulatory agencies.

Mr. OTTINGER. Madam Chairman, by passing a Sunshine Act, we have the rare opportunity not only to help relieve public criticism about a removed, secretive government, but also to reaffirm the principles on which this great Nation was founded 200 years ago. One of the main tenets of our Government is that it exists "for the people."

By opening up governmental processes to the scrutiny of the American public, we can tear down the wall of bureaucratic secrecy and help insure that the Government does indeed exist "for the people."

The concept behind the Government in the Sunshine Act, that of opening meetings of Federal agencies to the public, represents a large step toward restoring the public's confidence in its Government institutions. The Government Information and Individual Rights Subcommittee hearings provided us with a clear picture of how necessary a sunshine law is. At those hearings, David Cohen, president of Common Cause, said:

> For too long secrecy, mystery, remoteness have dominated government practices at all levels and in all branches. Let's have our leaders level with us, tell us what's going on, enable us to understand government decisions. Let's act on the recognition that government belongs to its citizens and not a variety of special interests or public officials.

As it now stands, the bill could use an improvement. The decision to drop statements of the reasons and statutory authority for transcript deletions furthers government secrecy and represents a regression from the bill's original intentions. People should be able to know why they are prevented from having information about agency proceedings. The Government Operations Committee's original version of this provision properly balanced the need to keep certain matters secret against the people's right to know.

There have been other attempts to weaken the bill. The movement to drop the verbatim transcript requirement must be defeated, as the change would constitute a further diminution of the people's right to know. During the course of legitimately closed meetings, there will occur discussion that would normally be made available to the public, but will not if the transcript requirement is dropped. By purporting to discuss any legitimately closed business, an agency could keep all of its meetings from being made open to the public. The cost of enforcing the transcript requirement is not enough to justify denying the people information that is rightfully theirs.

I believe that if we can resist attempts to weaken the bill, the Sunshine Act that results will be an outstanding legislative accomplishment. Especially since the Watergate crisis, people have withdrawn from and become distrustful of their Government. Government secrecy can only encourage distrust. Effective citizen participation in Government affairs is essential in a democracy, and for people to participate effectively, they must be informed of what goes on within the Government. In this our Bicentennial Year, let us make sure that the people's Government is in fact the people's Government. Let us reestablish the principle of openness in the affairs of the Federal Government.

Mr. DOWNEY of New York. Madam Chairman, I welcome this opportunity to affirm my support of H.R. 11656, the Government in the Sunshine Act.

This bill would require that meetings of Federal regulatory and other agencies be open to the public. Furthermore, it requires that when an agency closes a meeting under one of the exemptions in the bill, it must make a recording or verbatim transcript of the closed portion, and release to the public any part of the recording or transcript that does not contain exempt information.

To all firm believers of the democratic ideal, the passage of this important bill is obviously long overdue.

The revelations emanating from the Watergate era demonstrate only too clearly that many Federal agencies have been remiss in the honest performance of their delegated responsibilities, particularly when offered the protection of a sanctioned cloak of secrecy. The public often found itself less well served than private interests.

Documented evidence also proved that numerous governmental institutions, acting in a clandestine manner, have been guilty of immoral, unethical, and sometimes blatantly illegal acts that, were it not for some tenacious investigative newspaper reporting, might still be unknown of today.

The "fourth estate" must be commended for a job well done; but it is simply not enough to expect the press to perform this function on an ongoing basis. It is now time for the Congress to officially remove all roadblocks that may be encountered by anyone seeking to monitor their Government's activities. Our dedication to the concept of open government, as effectively espoused by the more "democratic" of our Founding Fathers, demands passage of the "Sunshine" Act.

The idea behind the bill is a simple one—open our Government's heretofore closed doors and "let the Sun shine in." Give the American public the opportunity to view their Government in an unfiltered light.

The consequences of the defeat of this bill would be painfully obvious—the abandonment of the ideals of Jefferson and Franklin; and the possible regression into a pre-Watergate government replete with camouflaged agency operations and lack of citizen participation.

The evidence adduced from Watergate should convince us that a bureaucracy free of public scrutiny is subject to temptations that can often result in violations of our moral and legal codes. The passage of H.R. 11656 will dramatically lessen these temptations.

Therefore, my sense of public responsibility and my faith in our democratic ideals compels me to urge the Members of the House to support the Government in the Sunshine Act. I further urge the rejection of any proposed amendments that seek to weaken this bill. The insertion of any such additions would only create loopholes that might tend to render H.R. 11656 virtually useless. The amendments must be rejected to allow the clear intent of this bill to remain untarnished.

The American public deserves the guarantees presented by this act.

It is our duty, as Representatives, to give America the "Sunshine" Act.

Mr. HORTON. Madam Chairman. I have no further requests for time.

Ms. ABZUG. Madam Chairman, I have no further requests for time.

The CHAIRMAN. The Clerk will read.

The Clerk read as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Government in the Sunshine Act".

AMENDMENT IN THE NATURE OF A SUBSTITUTE OFFERED BY MR. FLOWERS

Mr. FLOWERS. Madam Chairman, I offer an amendment in the nature of a substitute.

The Clerk read as follows:

Amendment in the nature of a substitute offered by Mr. Flowers: Strike out all after the enacting clause and insert in lieu thereof the following:

That this Act may be cited as the "Government in the Sunshine Act".

DECLARATION OF POLICY

Sec. 2. It is hereby declared to be the policy of the United States that the public is entitled to the fullest practicable information regarding the decision-making processes of the Federal Government. It is the purpose of this Act to provide the public with such information while protecting the rights of individuals and the ability of the Government to carry out its responsibilities.

OPEN MEETINGS

Sec. 3. (a) Title 5, United States Code, is amended by adding after section 552a the following new section:

"§ 552b. Open meetings

"(a) For purposes of this section—

"(1) the term 'agency' means the Federal Election Commission and any agency, as defined in section 552(e) of this title, headed by a collegial body composed of two or more individual members, a majority of whom are appointed to such position by the President with the advice and consent of the Senate, and includes any subdivision thereof authorized to act on behalf of the agency;

"(2) the term 'meeting' means an assembly or simultaneous communication concerning the joint conduct or disposition of agency business by two or more, but at least the number of individual agency members required to take action on behalf of the agency, but does not include meetings required or permitted by subsection (d); and

"(3) the term 'member' means an individual who belongs to a collegial body heading an agency.

"(b)(1) Members as described in subsection (a)(2) shall not jointly conduct or dispose of agency business without complying with subsections (b) through (g).

"(2) Except as provided in subsection (c), every portion of every meeting of an agency shall be open to public observation.

"(c) Except in a case where the agency finds that the public interest requires otherwise, subsection (b) shall not apply to any portion of an agency meeting and the requirements of subsection (d) and (e) shall not apply to any information pertaining to such meeting otherwise required by this section to be disclosed to the public, where the agency properly determines that such portion or portions of its meeting or the disclosure of such information is likely to—

"(1) disclose matters (A) specifically authorized under criteria established by an Executive order to be kept secret in the interests of national defense or foreign policy and (B) in fact properly classified pursuant to such Executive order;

"(2) relate solely to the internal personnel rules and practices of an agency;

"(3) disclose information required or permitted to be withheld from the public by any statute establishing particular criteria or referring to particular types of information;

"(4) disclose trade secrets and commercial or financial information obtained from a person and privileged or confidential;

"(5) involve accusing any person of a crime, or formally censuring any person;

"(6) disclose information of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy;

"(7) disclose investigatory records compiled for law enforcement purposes, or information which if written would be contained in such records, but only to the extent that the production of such records or information would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;

"(8) disclose information contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of any agency responsible for the regulation or supervision of financial institutions;

"(9) disclose information the premature disclosure of which would—

"(A) in the case of an agency which regulates currencies, securities, commodities, or financial institutions, be likely to (i) lead to significant financial speculation, or (ii) significantly endanger the stability of any financial institution; or

"(B) in the case of any agency, be likely to significantly frustrate implementation of a proposed agency action, except that this subparagraph shall not apply in any instance after the content or nature of the proposed agency action has been disclosed to the public by the agency, unless the agency is required by law to make such disclosure prior to taking final agency action on such proposal, or after the agency publishes or serves a substantive rule pursuant to section 553(d) of this title; or

"(10) specifically concern the agency's issuance of a subpena, or the agency's participation in a civil action or proceeding, an action in a foreign court or international tribunal, or an arbitration, or the initiation, conduct, or disposition by the agency of a particular case of formal agency adjudication pursuant to the procedures in section 554 of this title or otherwise involving a determination on the record after opportunity for a hearing.

"(d) (1) Action under subsection (c) to close a portion or portions of an agency meeting shall be taken only when a majority of the entire membership of the agency votes to take such action. A separate vote of the agency members shall be taken with respect to each agency meeting a portion or portions of which are proposed to be closed to the public pursuant to subsection (c). A single vote may be taken with respect to a series of portions of meetings which are proposed to be closed to the public, or with respect to any information concerning such series, so long as each portion of a meeting in such series involves the same particular matters, and is scheduled to be held no more than thirty days after the initial portion of a meeting in such series. The vote of each agency member participating in such vote shall be recorded and no proxies shall be allowed.

"(2) Whenever any person whose interests may be directly affected by a portion of a meeting requests that the agency close such portion to the public for any of the reasons referred to in paragraph (5), (6), or (7) of subsection (c), the agency, upon request of any one of its members, shall vote by recorded vote whether to close such meeting.

"(3) Within one day of any vote taken pursuant to paragraph (1) or (2), the agency shall make publicly available a written copy of such vote reflecting the vote of each member on the question. If a portion of a meeting is to be closed to the public, the agency shall, within one day of the vote taken pursuant to paragraph (1) or (2) of this subsection, make publicly available a full written explanation of its action closing the portion together with a list of all persons expected to attend the meeting and their affiliation.

"(4) Any agency, a majority of whose meetings may properly be closed to the public pursuant to paragraph (4), (8), (9)(A), or (10) of subsection (c), or any combination thereof, may provide by regulation for the closing of such meetings or portions thereof in the event that a majority of the members of the agency votes by recorded vote at the beginning of such meeting, or portion thereof, to close the exempt portion or portions of the meeting, and a copy of such vote, reflecting the vote of each member on the question, is made available to the public. The provisions of paragraphs (1), (2), and (3) of this subsection and subsection (e) shall not apply to any portion of a meeting to which such regulations apply: *Provided*, That the agency shall, except to the extent that such information is exempt from disclosure under the provisions of subsection (c), provide the public with public announcement of the date, place, and subject matter of the meeting and each portion thereof at the earliest practicable time and in no case later than the commencement of the meeting or portion in question.

"(e) In the case of each meeting, the agency shall make public announcement, at least one week before the meeting, of the date, place, and subject matter of the meeting, whether it is to be open or closed to the public, and the name and phone number of the official designated by the agency to respond to requests for information about the meeting. Such announcement shall be made unless a majority of the members of the agency determines by a recorded vote that agency business requires that such meeting be called at an earlier date, in which case the agency shall make public announcement of the date, place, and subject matter of such meeting, and whether open or closed to the public, at the earliest practicable time and in no case later than the commencement of the meeting or portion in question. The time, place, or subject matter of a meeting, or the determination of the agency to open or close a meeting, or portion of a meeting, to the public, may be changed following the public anouncement required by this paragraph only if (1) a majority of the entire membership of the agency determines by a recorded vote that agency business so requires

and that no earlier announcement of the change was possible, and (2) the agency publicly announces such change and the vote of each member upon such change at the earliest practicable time and in no case later than the commencement of the meeting or portion in question.

"(f) (1) A complete transcript or electronic recording adequate to record fully the proceedings shall be made of each meeting, or portion of a meeting, closed to the public, except for a meeting, or portion of a meeting, closed to the public pursuant to paragraph (10) of subsection (c). The agency shall make promptly available to the public, in a location easily accessible to the public, the complete transcript or electronic recording of the discussion at such meeting of any item on the agenda, or of the testimony of any witness received at such meeting, except for such portion or portions of such discussion or testimony as the agency determines to contain information specified in paragraphs (1) through (10) of subsection (c). Copies of such transcript, or a transcription of such electronic recording disclosing the identity of each speaker, shall be furnished to any person at no greater than the actual cost of duplication or transcription or, if in the public interest, at no cost. The agency shall maintain a complete verbatim copy of the transcript, or a complete electronic recording of each meeting, or portion of a meeting, closed to the public, for a period of at least two years after such meeting, or until one year after the conclusion of any agency proceeding with respect to which the meeting, or a portion thereof, was held, whichever occurs later.

"(2) Written minutes shall be made of any agency meeting, or portion thereof, which is open to the public. The agency shall make such minutes promptly available to the public in a location easily accessible to the public, and shall maintain such minutes for a period of at least two years after such meeting. Copies of such minutes shall be furnished to any person at no greater than the actual cost of duplication thereof or, if in the public interest, at no cost.

"(g) Each agency subject to the requirements of this section shall, within 180 days after the date of enactment of this section, following consultation with the Office of the Chairman of the Administrative Conference of the United States and published notice in the Federal Register of at least thirty days and opportunity for written comment by any persons, promulgate regulations to implement the requirements of subsections (b) through (f) of this section. Any person may bring a proceeding in the United States District Court for the District of Columbia to require an agency to promulgate such regulations if such agency has not promulgated such regulations within the time period specified herein. Subject to any limitations of time therefor provided by law, any person may bring a proceeding in the United States Court of Appeals for the District of Columbia to set aside agency regulations issued pursuant to this subsection that are not in accord with the requirements of subsections (b) through (f) of this section, and to require the promulgation of regulations that are in accord with such subsections.

"(h) The district courts of the United States have jurisdiction to enforce the requirements of subsections (b) through (f) of this section. Such actions may be brought by any person against an agency prior to, or within sixty days after the meeting out of which the violation of this section arises, except that if publlic announcement of such meeting is not initially provided by the agency in accordance with the requirements of this section, such action may be instituted pursuant to this section at any time prior to sixty days after any public announcement of such meeting. Such actions may be brought in the district court of the United States for the district in which the agency meeting is held, or in the District Court for the District of Columbia, or where the agency in question has its headquarters. In such actions a defendant shall serve his answer within twenty days after the service of the complaint, but such time may be extended by the court for up to twenty additional days upon a showing of good cause therefor. The burden is on the defendant to sustain his action. In deciding such cases the court may examine in camera any portion of a transcript or electronic recording of a meeting closed to the public, and may take such additional evidence as it deems necessary. The court, having due regard for orderly administration and the public interest, as well as the interests of the party, may grant such equitable relief as it deems appropriate, including granting an injunction against future violations of this section, or ordering the agency to make available to the public such portion of the transcript or electronic recording of a meeting as is not authorized to be withheld under subsection (c) of this section. Nothing in this section confers jurisdiction on any district court acting solely under this subsection to set aside, enjoin or invalidate any agency action taken or discussed at an agency meeting out of which the violation of this section arose.

"(i) The court may assess against any party reasonable attorney fees and other litigation costs reasonably incurred by any other party who substantially prevails in any action brought in accordance with the provisions of subsection (g) or (h) of this section, except that costs may be assessed against the plaintiff only where the court finds that the suit was initiated by the plaintiff primarily for frivolous or dilatory purposes. In the case of assessment of costs against an agency, the costs may be assessed by the court against the United States.

"(j) Each agency subject to the requirements of this section shall annually report to Congress regarding its compliance with such requirements, including a tabulation of the total number of agency meetings open to the public, the total number of meetings closed to the public, the reasons for closing such meetings, and a description of any litigation brought against the agency under this section, including any costs assessed against the agency in such litigation (whether or not paid by the agency).

"(k) Except as specifically provided in this section, nothing herein expands or limits the present rights of any person under section 552 of this title, except that provisions of this Act shall govern in the case of any request made pursuant to such section to copy or inspect the transcripts or electronic recordings described in subsection (f) of this section. The requirements of chapter 33 of title 44, United States Code, shall not apply to the transcripts and electronic recordings described in subsection (f) of this section.

"(l) This section does not constitute authority to withhold any information from Congress, and does not authorize the closing of any agency meeting or portion thereof otherwise required by law to be open.

"(m) Nothing in this section authorizes any agency to withhold from any individual any record, including transcripts or electronic recordings required by this Act, which is otherwise accessible to such individual under section 552a of this title.

"(n) In the event that any meeting is subject to the provisions of the Federal Advisory Committee Act as well as the provisions of this section, the provisions of this section shall govern.".

(b) The chapter analysis of chapter 5 of title 5, United States Code, is amended by inserting:

"552b. Open meetings."

immediately below:

"552a. Records about individuals.".

EX PARTE COMMUNICATIONS

SEC. 4. (a) Section 557 of title 5, United States Code, is amended by adding at the end thereof the following new subsection:

"(d)(1) In any agency proceeding which is subject to subsection (a) of this section, except to the extent required for the disposition of ex parte matters as authorized by law—

"(A) no interested person outside the agency shall make or cause to be made to any member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding an ex parte communication relative to the merits of the proceeding;

"(B) no member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, shall make or cause to be made to any interested person outside the agency an ex parte communication relative to the merits of the proceeding;

"(C) a member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of such proceeding who receives, or who makes or causes to be made, a communication prohibited by this subsection shall place on the public record of the proceeding:

"(i) all such written communications;

"(ii) memoranda stating the substance of all such oral communications; and

"(iii) all written responses, and memoranda stating the substance of all oral responses, to the materials described in clauses (i) and (ii) of this subparagraph;

"(D) in the event of a communication prohibited by this subsection and made or caused to be made by a party or interested person, the agency, administrative

law judge, or other employee presiding at the hearing may, to the extent consistent with the interests of justice and the policy of the underlying statutes, require the person or party to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation; and

"(E) the prohibitions of the subsection shall apply beginning at such time as the agency may designate, but in no case shall they begin to apply later than the time at which a proceeding is noticed for hearing unless the person responsible for the communication has knowledge that it will be noticed, in which case the prohibitions shall apply beginning at the time of his acquisition of such knowledge.

"(2) This section does not constitute authority to withhold information from Congress.".

(b) Section 551 of title 5, United States Code, is amended—

(1) by striking out "and" at the end of paragraph (12);

(2) by striking out the "act." at the end of paragraph (13) and inserting in lieu thereof "act; and"; and

(3) by adding at the end thereof the following new paragraph:

"(14) 'ex parte communication means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given.".

(c) Section 556(d) of title 5, United States Code, is amended by inserting between the third and fourth sentences thereof the following new sentence: "The agency may, to the extent consistent with the interests of justice and the policy of the underlying statutes administered by the agency, consider a violation of section 557(d) of this title sufficient grounds for a decision adverse to a person or party who has committed such violation or caused such violation to occur.".

CONFORMING AMENDMENTS

SEC. 5. (a) Section 410(b)(1) of title 39, United States Code, is amended by inserting after "Section 552 (public information)," the words "section 552a (records about individuals), section 552b (open meetings),".

(b) Section 552(b)(3) of title 5, United States Code, is amended to read as follows:

"(3) required or permitted to be withheld from the public by any statute establishing particular criteria or referring to particular types of information;"

EFFECTIVE DATE

SEC. 6. (a) Except as provided in subsection (b) of this section, the provisions of this Act shall take effect one hundred and eighty days after the date of its enactment.

(b) Subsection (g) of section 552b of title 5, United States Code, as added by section 3(a) of this Act, shall take effect upon enactment.

Mr. FLOWERS (during the reading). Madam Chairman, I ask unanimous consent that the amendment in the nature of a substitute be considered as read, and printed in the RECORD.

The CHAIRMAN. Is there objection to the request of the gentleman from Alabama?

There was no objection.

(Mr. FLOWERS asked and was given permission to revise and extend his remarks.)

Mr. FLOWERS. Madam Chairman, on the amendment in the nature of a substitute, which represents all of the amendments adopted in the Committee on the Judiciary as well as all the committee amendments of the Committee on Government Operations, I do not know that there is a great deal of controversy save in one particular and I would speak to this one which I believe to be in controversy and then will have something to say in reference to what I know will be the allegations of the opponents of this amendment. In one of the amendments that the Committee on the Judiciary recommends in its package, in regard to subsection (f) of the new section concerning transcripts of closed

meetings, the Committee on Government Operations' bill requires that a complete transcript or electronic recording which is adequate to record the proceedings shall be made of each meeting or portion of a meeting, closed to the public, except for a meeting, or portion of a meeting, closed to the public pursuant to paragraph (10) of subsection (c).

The committee considered the difficulties incident to the review of the transcript of the closed meetings required by the original provisions of the bill. The bill would require that each deletion—this is under the Committee on Government Operations' version—authorized by an exception in the section would be made by recorded vote of the agency taken subsequent to the meeting.

It was pointed out that this would require considerable expenditure of time of officials of the Agency, and this would be cumbersome and time consuming. We determined that the intent of the bill could be adequately carried out by deleting this provision and similarly deleting the provision requiring a written explanation of the reason and statutory basis for each deletion.

This is, Madam Chairman, where we cross swords over the matter of the written explanation and the statutory basis for the deletion. And I hope the Members will oppose the gentleman from Florida's amendment.

Mr. FASCELL. Madam Chairman, will the gentleman yield?

Mr. FLOWERS. I yield to the gentleman from Florida.

Mr. FASCELL. I thank the gentleman for yielding.

If the gentleman will permit me, let me express my appreciation first to him and his subcommittee for the very careful and thorough consideration he gave this bill, and for the prompt manner in which he acted on the bill. I also have no objection to the amendment, except the difference on the one the gentleman has pointed out. I intend to offer an amendment here as soon as I can to read that in place of each portion deleted from such transcript, the agency shall supply written explanation of the reason, et cetera, simply on the theory that if we are going to be faced with pages of deletion, at least we ought to know what the citation of the statute is and some explanation of the deletion.

Mr. FLOWERS. I understand the gentleman fully, and it would only be my concern that we could get too specific here, and that the reason for the deletion might require too much elaboration and could be an onerous task.

Let me say before I stop here that I fully support the legislation. I think it is an excellent piece of work that the gentleman's committee has done, the gentlewoman from New York (Ms. ABZUG), the gentleman from Texas (Mr. BROOKS), and all of the members of the Committee on Government Operations. You have brought us an excellent piece of work, something that has been long coming. And I think that the agencies are going to find that the rays of sunshine do not really bother them at all that much.

Mr. FASCELL. If the gentleman will yield further, I agree, of course, that we have sunshine in the Congress. We cannot hurt the executive agencies. We are trying to help them.

I was very much impressed with the thorough consideration given by the gentleman's subcommittee. I know that there were a lot of amendments considered. But the committee went through them all and carefully decided which ones they would support.

Mr. FLOWERS. I thank the gentleman for his comments.

Madam Chairman, I yield back the remainder of my time.

AMENDMENT OFFERED BY MR. FASCELL TO THE AMENDMENT IN THE NATURE OF A SUBSTITUTE OFFERED BY MR. FLOWERS

Mr. FASCELL. Madam Chairman, I offer an amendment to the amendment in the nature of a substitute.

The Clerk read as follows:

Amendment offered by Mr. FASCELL to the amendment in the nature of a substitute offered by Mr. FLOWERS: Page 10, line 12, after "subsection (c)," add the following: "In place of each portion deleted from such a transcript or transcription the agency shall supply a written explanation of the reason for the deletion, and the portion of subsection (c) and any other statute said to permit the deletion.".

Mr. FASCELL. Madam Chairman, the bill provides that most of the meetings must be open to the public and it requires that transcripts be made of the meetings that are closed under the 10 exemptions. Transcripts are required for two reasons; One is so that any portion of the meeting that turns out not to contain exempt material may be released to the public, and in case a suit is brought by the citizen. Under this bill of course that is a remedy a citizen has when a meeting is wrongfully closed.

The original bill considered by the Government Operations Committee requires when material is deleted the agency must state the reason and the statutory basis therefore and give a summary or paraphrase of the deleted material. Because some agencies objected to the requirement of the summary or paraphrase, that was dropped by the Government Operations Committee, leaving only the requirements for the reason and the statutory basis.

Then the bill went to the Judiciary Committee which recommended even that language be removed, and it is that language which I seek to restore to the bill, so that if there is a deletion we would have at least to give the reason and statutory citation. We maintain that is not unreasonable. It does not put an unnecessary or intolerable burden on the agency. But obviously all of us have had experience in dealing with our own transcripts where we are met with pages and pages of blank spaces which simply say "deletion." We can get nothing out of it. I can understand why we might not want to put a summary in and we have left that out, but I see no reason why we cannot say "security deletion, Public Law 1234, paragraph (a), (b), or (c)." That is not so bad.

It is, as the gentleman from Alabama says, no big deal, but we think it will be helpful in carrying out the spirit and thrust of this act. I hope this simple amendment can be adopted.

Mr. HORTON. Madam Chairman, I rise in opposition to the amendment offered by Mr. FASCELL which will require a reason be given for the deletion of certain exempted information or a summary of the deleted information.

First let me state I am opposed to the unique requirement of a verbatim transcript for reasons which have and will be elaborated on. There are many adverse consequences that will result if this amendment is passed but I request my colleagues to reflect on only two very clear and simple ones.

There are only 10 narrowly defined exemptions which can be asserted to withhold information from the public. These 10 are overwhelmingly supported by Members of both bodies of this Congress. Yet, this amendment says there are 10 categories of information that should be protected, but not protected completely. Let us delete it from the public record, then let us sanction "official leaks" by giving the reason or a summary of the information. This clearly is contradictory and unacceptable.

The other point I would like to submit for your consideration is the primary purpose of this legislation. That is, to allow every citizen interested in the work of his Government access to proceedings conducted by various agencies. Again, I remind you of the 10 narrowly defined exemptions. However, if this amendment is passed, there will be hints, clues, and even summaries of information which should not be made public by the 10 exemptions. These clues and summaries will not aid or benefit the vast majority of the American public. They will, however, greatly benefit select and sophisticated groups. This amendment will provide information to these groups which, because of their expertise, can utilize in financial and market speculation. This clearly discriminates against the general public. This amendment could be titled "Aid and Benefit to Financial Speculators."

There are many other serious and complex consequences that will result if this amendment is passed but I only ask consideration of these two very simple and clear results as I feel they are more than sufficient to defeat this amendment.

Mr. MOORHEAD of California. Madam Chairman, will the gentleman yield?

Mr. HORTON. I yield to the gentleman from California.

Mr. MOORHEAD of California. Madam Chairman, I am also opposed to this amendment. People in the agencies handling delicate matters, such as those connected with the market and many other things, have told us if they have to give an explanation, that people who are wise in the matters concerned will be able to tell from the explanation really what was in the part that was deleted and we fail to serve the purpose if we require that to be included. In many instances, it will work great harm to the country.

Mr. HORTON. Madam Chairman, I thank the gentleman.

I am opposed to the amendment and urge my colleagues to oppose it.

Mr. FASCELL. Madam Chairman, I make the point of order that a quorum is not present.

The CHAIRMAN. Evidently a quorum is not present.

The Chair announces that pursuant to clause 2, rule XXIII, she will vacate proceedings under the call when a quorum of the Committee appears.

Members will record their presence by electronic device.

The call was taken by electronic device.

The CHAIRMAN. A quorum of the Committee on the Whole has not appeared.

The Chair announces that a regular quorum call will now commence.

Members who have not already responded under the noticed quorum call will have a minimum of 15 minutes to record their presence. The call will be taken by electronic device.

The call was taken by electronic device, and the following Members failed to respond:

[Roll No. 559]

Andrews, N.C.	Gaydos	Randall
Ashbrook	Hansen	Rees
AuCoin	Harrington	Riegle
Badillo	Hébert	Roe
Boggs	Heckler, Mass.	Rostenkowski
Brown, Mich.	Heinz	Ruppe
Cederberg	Helstoski	Santini
Chisholm	Hinshaw	Scheuer
Clay	Holland	Shuster
Cochran	Jarman	Sisk
Collins, Ill.	Jones, Ala.	Stanton, James V.
Conyers	Jones, N.C.	Steed
Dellums	Jones, Tenn.	Steiger, Ariz.
Dent	Karth	Stephens
Derrick	Kemp	Stratton
Derwinski	Landrum	Stuckey
Diggs	Litton	Sullivan
Dingell	McDade	Symington
Downing, Va.	Mathias	Udall
Drinan	Murphy, N.Y.	Vander Veen
Esch	Nowak	Wampler
Evans, Colo.	O'Hara	Wiggins
Evans, Ind.	O'Neill	Wilson, C. H.
Evins, Tenn.	Patterson, Calif.	Wilson, Tex.
Fascell	Peyser	Young, Alaska
Fountain	Pike	Zeferetti
Fraser	Railsback	

Accordingly the Committee rose; and the Speaker having resumed the Chair, Mrs. BURKE of California, Chairman of the Committee of the Whole House on the State of the Union, reported that that committee, having had under consideration the bill H.R. 11656, and finding itself without a quorum, she had directed the Members to record their presence by electronic device, whereupon 352 Members recorded their presence, a quorum, and she submitted herewith the names of the absentees to be spread upon the journal.

The Committee resumed its sitting.

The CHAIRMAN. The gentleman from Texas (Mr. BROOKS) is recognized for 5 minutes.

(Mr. BROOKS asked and was given permission to revise and extend his remarks.)

Mr. BROOKS. Madam Chairman, I rise in support of the amendment offered by the gentleman from Florida (Mr. FASCELL) to the amendment in the nature of a substitute offered by the gentleman from Alabama (Mr. FLOWERS) which amendment would require that the agencies seeking to cut out language or delete it in one form or another, to give a written explanation on why they cut it out and any statutes that are said to give them that authority.

The amendment is simple logic. If material is deleted from a transcript, some indication of the reason and the authority for the deletion should be stated and can be stated without any difficulty.

A blank space is going to be meaningless and confusing. It will cause more problems for the agency than a statement of the authority for the deletion would. The amendment is a compromise from the original language. The original bill provided for a summary or a paraphrase of that material. The Committee on Government Operations reduced that to a simple citation of the reason for the deletion. The citation of the authority for the deletion certainly is not onerous. It will not reveal any confidential information.

Madam Chairman, I support the amendment offered by the gentleman from Florida as a very reasonable and worthwhile compromise.

The CHAIRMAN. The time of the gentleman has expired.

Mr. FLOWERS. Madam Chairman, I move to strike the requisite number of words, and I rise in opposition to the amendment.

(Mr. FLOWERS asked and was given permission to revise and extend his remarks.)

Mr. FLOWERS. Madam Chairman, I do not think that this amendment and the subject matter we are dealing with here are as important as some of the other things we are going to deal with later on, on which there will be amendments to this legislation. However, I am constrained to oppose it.

The Committee on the Judiciary struck this provision, because it was our considered judgment that it did amount to an onerous task to foster off on these agencies, in addition to all of the other things we are putting into this legislation, if we require them to offer an explanation of the reasons for the deletion and the statutory authority. This could in effect amount to about the same thing as a summary, thereby giving rise to placing in the transcript the same information that would be the reason for their deleting the subject matter in the first place.

The full transcript will still be available for the judge, and we do not think there is any real reason for requiring the additional effort, the additional work on the part of rather high level people in these agencies and departments. Therefore, we did not think this provision was necessary.

Madam Chairman, I urge my colleagues to vote "no" on this amendment.

Mrs. FENWICK. Madam Chairman, will the gentleman yield?

Mr. FLOWERS. I yield to the gentlewoman from New Jersey.

Mrs. FENWICK. I thank the gentleman for yielding.

I would like to ask a question. My trouble with this amendment is the definition of the word "explanation." Perhaps I should address this question to our colleague, the gentleman from Florida.

Mr. FASCELL. Madam Chairman, will the gentleman yield?

Mr. FLOWERS. I yield to the gentleman from Florida.

Mr. FASCELL. I thank you for yielding.

I will be delighted to answer the question of the gentlewoman. The explanation that is required would be that whatever the deletion is, it is within the statutory exemption, for example, because the testimony herein deleted might adversely affect the national security, or the national economy, or affect the rights or life of an individual, and it requires a citation of the statute of that authority. It does not require a summary or a paraphrasing of the testimony.

Mrs. FENWICK. If the gentleman will yield further, am I correct in saying, then, that the explanation could be as brief as, "national security," "the national economy," "the welfare of the masses," or something of that kind, citing subsection (c)?

Mr. FASCELL. If the gentleman will yield further, the gentlewoman from New Jersey is absolutely correct. The only thing one would have to add to it is the statutory citation.

Mrs. FENWICK. Subsection (c)?

Mr. FASCELL. That is right.

Mr. SEIBERLING. Madam Chairman, I move to strike the last word.

If the gentlewoman from New Jersey would look at the supplemental views of six of the members of the Committee on the Judiciary, including this member—and there are four printings of the supplemental views, but they are all basically identical—she would find that we make a very clear distinction between summaries, which is what was deleted by the Committee on Government Operations, and explanations and citations of authority, which is what was deleted by the Committee on the Judiciary—in my view a mistaken deletion.

I strongly support the Fascell amendment and regret that the majority of my colleagues on the Judiciary Committee took the step of deleting it.

Mr. KINDNESS. Madam Chairman, I move to strike the last word.

Madam Chairman, I rise in strong opposition to the amendment and I will yield in a moment to my colleague, the gentleman from New York (Mr. HORTON), who will also fill Members in on the reasons for the opposition.

It is important to learn what we are doing is gutting the exemptions to the bill, in at least some cases. The exemptions to the bill relating to the national security and trade secrets and matters of that sort are in there for a good purpose and they are supported by the overwhelming majority I am sure of the Members of the House and certainly of the other body.

We recognize the need for some materials not being disclosed publicly. This amendment in the case, for example, of the Federal Reserve Board or the Securities and Exchange Commission, if it required disclosure in the way this amendment proposes, would give all the information that is necessary to a highly sophisticated group of people who follow what is going on in the SEC or the FRB. So in effect this amendment would remove part of the effectiveness of those exemptions. I would urge a "no" vote overwhelmingly against this amendment.

I yield now to the gentleman from New York (Mr. HORTON).

Mr. HORTON. Madam Chairman, I thank the gentleman for yielding.

I have already addressed myself to this amendment and expressed my opposition to it, but I would like to point out to the Members that the amendment that has been offered is to restore language that was in the Government Operations Committee bill. Subsequent to the action by the Government Operations Committee the bill was referred sequentially to the Judiciary Committee. We just heard the chairman of the subcommittee that handled this bill for the Judiciary Subcommittee indicate that they had this matter before them and that they decided to remove this language because for all practical purposes it made the Freedom of Information Act deletions or exemptions moot. They are not effective if this amendment goes through.

For all practical purposes, if there is a reason for closing a meeting and one has to explain the reason for those deletions when the report is made or when there is a deletion or when a summary is made available to the public, that is going to mean to those sophisticates who know what is involved in that meeting, exactly what occurred.

I think this is a devastating amendment as far as the ability of these agencies to delete material. On the one hand we say under

the Freedom of Information Act they can exempt or delete material before making it public and then on the other hand we turn around and say if they do delete when they make the transcript public then they have to give the reasons for it, so that is tantamount to removing whatever exemptions they might have.

Some of these regulatory agencies have some very sensitive matters that relate to economics and national security and financial matters that ought not be released.

So I hope my colleagues will oppose this amendment and vote it down.

The CHAIRMAN. The question is on the amendment offered by the gentleman from Florida (Mr. FASCELL) to the amendment in the nature of a substitute offered by the gentleman from Alabama (Mr. FLOWERS).

RECORDED VOTE

Ms. ABZUG. Madam Chairman, I demand a recorded vote.

A recorded vote was ordered.

The vote was taken by electronic device, and there were—ayes 232, noes 168, not voting 32, as follows:

[Roll No. 560]

AYES—232

Abzug
Adams
Addabbo
Alexander
Allen
Ambro
Anderson, Calif.
Andrews, N.C.
Annunzio
Aspin
Badillo
Bafalis
Baldus
Baucus
Bauman
Beard, R.I.
Bedell
Bennett
Bergland
Biaggi
Bingham
Blanchard
Blouin
Boland
Bolling
Bonker
Brademas
Brinkley
Brodhead
Brooks
Brown, Calif.
Burke, Calif.
Burke, Mass.
Burlison, Mo.
Burton, John
Burton, Phillip
Carney
Carr
Chappell
Chisholm
Clancy
Cleveland
Cohen
Collins, Ill.
Conte
Conyers
Corman
Cornell
Cotter
Crane
D'Amours
Daniels, N.J.
Davis
de la Garza
Delaney
Dellums
Derrick
Derwinski
Diggs
Dingell
Dodd
Downey, N.Y.
Drinan
Duncan, Oreg.
du Pont
Early
Eckhardt
Edgar
Edwards, Calif.
Eilberg
Emery
Evans, Colo.
Evans, Ind.
Evins, Tenn.
Fary
Fascell
Fenwick
Fisher
Fithian
Flood
Florio
Foley
Ford, Mich
Ford, Tenn.
Fraser
Fuqua
Gaydos
Giaimo
Gibbons
Gilman
Gonzalez
Grassley
Green
Haley
Hall, Ill.
Hall, Tex.
Hamilton
Hanley
Hannaford
Harkin
Harrington
Harris
Hawkins
Hayes, Ind.
Hays, Ohio
Hechler, W. Va.
Heckler, Mass.
Heinz
Hicks
Holland
Holtzman
Howard
Howe
Hughes
Jacobs
Jeffords
Jenrette
Johnson, Calif.
Johnson, Colo.
Jordan

Kastenmeier
Kelly
Keys
Koch
Krebs
Lehman
Lent
Levitas
Lloyd, Calif.
Long, La.
Long, Md.
McHugh
McKay
Madden
Maguire
Mann
Mathis
Matsunaga
Meeds
Melcher
Metcalfe
Meyner
Mezvinsky
Mikva
Miller, Calif.
Mineta
Minish
Mink
Mitchell, Md.
Moakley
Moffett
Moorhead, Pa.
Mosher
Moss
Mottl
Murphy, Ill.
Murphy, N.Y.
Neal
Nedzi
Nix
Nolan
Nowak
Oberstar
Obey
Ottinger
Passman
Patterson, Calif.
Paul
Pepper
Perkins
Pickle
Pike
Pressler
Preyer
Price
Rangel
Reuss
Richmond
Rinaldo
Rodino
Rogers
Roncalio
Rooney
Rose
Rosenthal
Roush
Roybal
Russo
Ryan
St Germain
Santini
Sarbanes
Scheuer
Schroeder
Seiberling
Sharp
Shipley
Simon
Smith, Iowa
Solarz
Spellman
Staggers
Stanton, James V.
Stark
Steelman
Stokes
Studds
Symms
Thompson
Thornton
Traxler
Tsongas
Udall
Ullman
Van Deerlin
Vander Veen
Vanik
Vigorito
Waxman
Weaver
Whalen
White
Wirth
Wolff
Wright
Wydler
Wylie
Yates
Yatron
Young, Fla.
Young, Ga.
Young, Tex.

NOES—168

Abdnor
Anderson, Ill.
Andrews, N. Dak.
Archer
Armstrong
Ashley
Beard, Tenn.
Bell
Bevill
Biester
Boggs
Bowen
Breaux
Breckinridge
Broomfield
Brown, Mich.
Brown, Ohio
Broyhill
Buchanan
Burgener
Burke, Fla.
Burleson, Tex.
Butler
Byron
Carter
Cederberg
Clausen, Don H.
Clawson, Del
Cochran
Collins, Tex.
Conable
Conlan
Coughlin
Daniel, Dan
Daniel, R. W.
Danielson
Devine
Dickinson
Downing, Va.
Duncan, Tenn.
Edwards, Ala.
English
Erlenborn
Eshleman
Findley
Fish
Flowers
Flynt
Forsythe
Frenzel
Frey
Ginn
Goldwater
Goodling
Gradison
Gude
Guyer
Hagedorn
Hammerschmidt
Harsha
Hébert
Hefner
Henderson
Hightower
Hillis
Holt
Horton
Hubbard
Hungate
Hutchinson
Hyde
Ichord
Jarman
Johnson, Pa.
Jones, N.C.
Jones, Okla.
Kasten
Kazen
Kemp
Ketchum
Kindness
Krueger
LaFalce
Lagomarsino

Latta
Lloyd, Tenn.
Lott
Lujan
Lundine
McClory
McCloskey
McCollister
McCormack
McDade
McDonald
McEwen
McFall
McKinney
Madigan
Mahon
Martin
Mazzoli
Michel
Milford
Miller, Ohio
Mills
Mitchell, N.Y.
Mollohan
Montgomery
Moore
Moorhead, Calif.
Morgan
Murtha
Myers, Ind.
Myers, Pa.
Natcher
Nichols
O'Brien
Patten, N.J.
Pattison, N.Y.
Pettis
Poage
Pritchard
Quie
Quillen
Railsback
Randall
Rees
Regula
Rhodes
Risenhoover
Roberts
Robinson
Rousselot
Runnels
Ruppe
Sarasin
Satterfield
Schneebeli
Schulze
Sebelius
Shriver
Shuster
Sikes
Skubitz
Slack
Smith, Nebr.
Snyder
Spence
Stanton, J. William
Steed
Steiger, Wis.
Stephens
Talcott
Taylor, Mo.
Taylor, N.C.
Teague
Thone
Treen
Vander Jagt
Waggonner
Walsh
Whitehurst
Whitten
Wilson, Bob
Winn
Young, Alaska
Zablocki

NOT VOTING—32

Ashbrook
AuCoin
Clay
Dent
Esch
Fountain
Hansen
Helstoski
Hinshaw
Jones, Ala.
Jones, Tenn.
Karth
Landrum
Leggett
Litton
O'Hara
O'Neill
Peyser
Riegle
Roe
Rostenkowski
Sisk
Steiger, Ariz.
Stratton
Stuckey
Sullivan
Symington
Wampler
Wiggins
Wilson, C. H.
Wilson, Tex.
Zeferetti

The Clerk announced the following pairs:

On this vote:

Mr. O'Neill for, with Mr. Landrum against.
Mr. Dent for, with Mr. Steiger of Arizona against.
Mr. Helstoski for, with Mr. Wampler against.
Mr. Zeferetti for, with Mr. Wiggins against.
Mr. Rostenkowski for, with Mr. Fountain against.
Mr. Symington for, with Mr. Ashbrook against.
Mr. Charles H. Wilson of California for, with Mr. Hansen against.

Messrs. Derwinski, Bauman, Symms, and Shipley changed their vote from "no" to "aye."

Mr. Randall changed his vote from "aye" to "no."

So the amendment to the amendment in the nature of a substitute was agreed to.

The result of the vote was announced as above recorded.

AMENDMENT OFFERED BY MR. HORTON TO THE AMENDMENT IN THE NATURE OF A SUBSTITUTE OFFERED BY MR. FLOWERS

Mr. HORTON. Mr. Chairman, I offer an amendment to the amendment in the nature of a substitute.

The Clerk read as follows:

Amendment offered by Mr. Horton to the amendment in the nature of a substitute offered by Mr. Flowers: Page 3, strike lines 3 through 9 and insert:

"(2) the term 'meeting' means a gathering to jointly conduct or dispose of agency business by two or more, but at least the number of individual agency members required to take action on behalf of the agency, but does not include gatherings required or permitted by subsection (d); and"

Mr. HORTON. Madam Chairman, this amendment would bring the definition of meeting in line with the realities of life.

As now written, the definition would mean that telephone conversations and gatherings of agency members at social events, on a golf course or elsewhere would be covered by the act if any mention of agency business was made in informal conversation. It makes the decision as to whether there will be a meeting dependent on what occurs at the meeting. The impracticability of subjecting such a broadly defined gathering to prior public announcement, to the open meeting requirement, to the requirement for a formal vote for meeting closing and to the verbatim transcript requirement can only have the effect of restricting the right of assembly and free speech of public officials without any corresponding benefit to the public at large. This is a patently ridiculous requirement, because it does not limit the application of the act to meetings or gatherings called for the purpose of agency business.

The Senate-passed bill defines a meeting as "the deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations concern the joint conduct or disposition of official agency business." The House Government Operations Committee bill omits the word "official" from the definition of meetings. This omission immediately broadens the range of member conversations which must be covered by the procedural requirements of the bill. The report on the bill specifically states that "the conduct of agency business is intended to include not just the formal decisionmaking or voting, but all discussion relating to the business of an agency." Then, the House Judiciary Committee set forth a third definition of meeting which in turn differs from the wording recommended by the Judiciary Subcommittee which considered the bill.

It is not easy to strike a balance between the various public interests to be served, but we have a special responsibility to enact responsible legislation which will promote greater openness in Government at the same time that it is not unnecessarily burdensome and does not unnecessarily hinder public officials from carrying out their responsibilities.

My amendment would restore the language adopted by the Subcommittee on Administrative Law and Governmental Relations by a 5-to-0 vote and would make it clear that a meeting, within the terms of this bill, should be limited to a "gathering" of agency members in a single physical location for the purpose of conducting agency business.

I appeal to my colleagues to consider this amendment on its merits and urge its adoption.

Mr. BROOKS. Madam Chairman, I rise in opposition to the amendment.

The definition in the bill is designed to cover any situation in which the number of agency members required to take action do, in fact, discuss or conduct agency business. The amendment of the gentleman from New York would require that the members physically gather together with the express intention of conducting business.

It is easy to see how an agency could avoid the requirements of the bill if the amendment were adopted. The agency members would simply get on the telephone in a series of calls, or in a conference call, and their discussions or any results from them, would not have to be made public.

The amendment also requires that the gathering be for the express purpose of conducting business. So all they have to do is plan a nice social evening—say a birthday celebration for one of the members—and if they happen to talk business over the drinks and dinner, well, that just would not be covered.

What we want to reach in this bill are the deliberations of agency members relating to agency business. The definition in the bill accomplishes this. The amendment of the gentleman from New York would open a huge loophole and I urge its defeat.

Mr. McCloskey. Madam Chairman, I rise in support of the amendment.

(Mr. McCloskey asked and was given permission to revise and extend his remarks.)

Mr. McCloskey. Madam Chairman, I would like to direct the attention of the House to the definition of the term "meeting," which we seek to change in this amendment.

The term "meeting" means, and I quote:

> An assembly or simultaneous communication concerning the joint conduct or disposition of agency business by two or more, but at least the number of individual agency members required to take action on behalf of the agency, * * *

Madam Chairman, what that precludes is the casual meeting of people at breakfast or at lunch or elsewhere to discuss any action which may later be taken at the formal meeting of the board.

If two members, for example, of the Securities and Exchange Commission, who, by their rules, are empowered to take action, could meet at breakfast to discuss, even in the most casual way, what they might later take up in a formal meeting with the other members, they would be required to be subject to a civil or other penalty by holding that meeting without holding it in abeyance for 1 day to announce that they were going to have a closed meeting. They would be subject to penalty because they have no transcription of that meeting.

Madam Chairman, this bill in front of us today purports to bring to the Federal Government the same kind of sunshine requirements which have been widely adopted by most of the enlightened States of this Union, including California, with California's Brown Act, which requires public meetings.

The California law, however, makes no requirement that two State legislators who sit on the same committee to act on committee business could not discuss that business if they met casually.

Take the subcommittee which presented this bill and whose chairman is the gentlewoman from New York (Ms. Abzug) and on which we have seven members. If four of us should meet here in the well of the House to discuss how we could get the rest of the subcommittee

to go up to a room to get a quorum, as we have done, so as to pass a bill, that meeting would be illegal because we had not held a public meeting in advance voting to meet in private.

All we do in this bill is to seek to retain good balance between good government and open government. We are reacting as we did in the Freedom of Information Act, and others, because of excessive abuses of secrecy by the executive branch. And obviously the attention of the public that has been focused on that problem will not bring people into the Government and these commissions in the future. I would suggest the question to the Members that if any one of us were asked to serve on such a commission in the future, would we want to subject ourselves to that role if we could not casually discuss a matter that we were ultimately going to act upon with one of our colleagues? That is the effect of the bill as presently written.

Madam Chairwoman, I submit that the amendment should be adopted so as to strike a proper balance between open meetings and the conduct of good government.

Ms. ABZUG. Madam Chairman, I move to strike the requisite number of words and I rise in opposition to the amendment offered by the gentleman from New York (Mr. HORTON) to the amendment in the nature of a substitute offered by the gentleman from Alabama (Mr. FLOWERS).

(Ms. ABZUG asked and was given permission to revise and extend her remarks.)

Ms. ABZUG. Madam Chairman, I think it is important that the Members be aware that the definition in the bill does not include chance meetings or casual or incidental discussions of agency business. Those Members who support this amendment keep insisting that they would be included. We have made our legislative record here and in our committee reports, and the Members can be assured that the intent here is not to include a casual discussion or chance meeting.

Mr. MCCLOSKEY. Madam Chairman, would the gentlewoman yield?

Ms. ABZUG. I yield to the gentleman from California.

Mr. MCCLOSKEY. Madam Chairman, I do not know how we can take the language of this section other than as written which describes simultaneous communication concerning the joint conduct or disposition of agency business by two or more, not to include simultaneous communication between two people on business that they are about to decide. And the legislative history can only help us when the language is not clear, but this language is clear that any simultaneous meeting between two Members would be precluded.

Ms. ABZUG. If the gentleman from California will read the language, it says that the term "meeting" means an assembly. I think we can hardly interpret incidental or casual getting together as being an assembly.

Mr. FLOWERS. Madam Chairman, would the gentlewoman yield?

Ms. ABZUG. I yield to the gentleman from Alabama.

Mr. FLOWERS. Madam Chairman, I think that the key words are "concerning the joint conduct or disposition of agency business." I would ask how a casual meeting of two can decide how they are going to do it. This is concerning agency business. If you are just meeting at breakfast, or in the well of the House, or wherever and you are talking about how you are going to get a quorum, that is not concerning the joint conduct or disposition of agency business, and it is not

a matter of making up two minds in advance. The definition in the amendment in the nature of a substitute that we are dealing with may be imperfect, but I think it is better than what we are being offered in its stead.

The CHAIRMAN. The question is on the amendment offered by the gentleman from New York (Mr. HORTON), to the amendment in the nature of a substitute offered by the gentleman from Alabama (Mr. FLOWERS).

The question was taken; and the Chairman announced that the noes appeared to have it.

RECORDED VOTE

Mr. HORTON. Madam Chairman, I demand a recorded vote.

A recorded vote was ordered.

The vote was taken by electronic device, and there were—ayes 204, noes 180, not voting 48, as follows:

[Roll No. 561]

AYES—204

Abdnor
Adams
Anderson, Ill.
Andrews, N.C.
Andrews, N. Dak.
Archer
Armstrong
Ashbrook
Bauman
Beard, Tenn.
Bedell
Bell
Bergland
Biester
Boggs
Bowen
Breaux
Brinkley
Broomfield
Brown, Mich.
Broyhill
Buchanan
Burgener
Burke, Fla.
Burleson, Tex.
Butler
Byron
Carter
Cederberg
Chappell
Clausen, Don H.
Clawson, Del
Cochran
Cohen
Collins, Tex.
Conable
Conlan
Coughlin
Crane
Daniel, Dan
Daniel, R. W.
de la Garza
Derrick
Derwinski
Devine
Dickinson
Downing, Va.
Duncan, Tenn.
du Pont
Edwards, Ala.
Erlenborn
Eshelman
Evans, Colo.
Evans, Ind.
Fenwick
Findley
Fish
Flynt
Foley
Forsythe
Frenzel
Frey
Gaydos
Ginn
Goldwater
Gonzalez
Goodling
Gradison
Grassley
Guyer
Hagedorn
Haley
Hall, Tex.
Hammerschmidt
Hanley
Harris
Harsha
Hébert
Heckler, Mass.
Hefner
Henderson
Hightower
Hillis
Holland
Holt
Horton
Hubbard
Hutchinson
Hyde
Ichord
Jacobs
Jarman
Jeffords
Johnson, Colo.
Johnson, Pa.
Jones, N.C.
Jones, Okla.
Kasten
Kazen
Kelly
Kemp
Ketchum
Kindness
Krebs
LaFalce
Lagomarsino
Latta
Lent
Levitas
Lloyd, Calif.
Lloyd, Tenn.
Long, Md.
Lott
Lujan
Lundine
McClory
McCloskey
McCollister
McCormack
McDade
McDonald
McEwen
McKay
McKinney
Madden
Madigan
Mahon
Mann
Martin
Mathis

Melcher
Michel
Milford
Miller, Ohio
Mills
Mitchell, N.Y.
Mollohan
Montgomery
Moore
Moorhead, Calif.
Mosher
Murtha
Myers, Ind.
Myers, Pa.
Natcher
O'Brien
Passman
Patten, N.J.
Paul
Pepper
Pettis
Poage
Quie
Quillen
Railsback
Rees
Regula
Rhodes
Roberts
Robinson
Roush
Rousselot
Runnels
Ruppe
Ryan
Sarasin
Satterfield
Schneebeli
Schulze
Sebelius
Shriver
Shuster
Sikes
Skubitz
Slack
Smith, Iowa
Smith, Nebr.
Snyder
Spence
Stanton, J. William
Steed
Steiger, Wis.
Stephens
Symms
Talcott
Taylor, Mo.
Taylor, N.C.
Teague
Thone
Treen
Van Deerlin
Vander Jagt
Waggonner
Walsh
White
Whitehurst
Whitten
Wilson, Bob
Winn
Wright
Wydler
Wylie
Young, Alaska
Young, Tex.

NOES—180

Abzug
Addabbo
Alexander
Allen
Ambro
Anderson, Calif.
Annunzio
Aspin
Badillo
Bafalis
Baldus
Baucus
Beard, R.I.
Bennett
Bevill
Biaggi
Bingham
Blanchard
Blouin
Boland
Bolling
Bonker
Brademas
Breckinridge
Brooks
Brown, Calif.
Burke, Calif.
Burke, Mass.
Burlison, Mo.
Burton, John
Burton, Phillip
Carney
Carr
Chisholm
Clancy
Cleveland
Collins, Ill.
Conte
Conyers
Corman
Cornell
Cotter
D'Amours
Daniels, N.J.
Danielson
Davis
Delaney
Dellums
Diggs
Dodd
Downey, N.Y.
Drinan
Duncan, Oreg.
Early
Edgar
Edwards, Calif.
Eilberg
Emery
English
Fary
Fascell
Fisher
Fithian
Flood
Florio
Flowers
Ford, Mich.
Ford, Tenn.
Fraser
Fuqua
Gibbons
Gilman
Green
Gude
Hall, Ill.
Hamilton
Hannaford
Harkin
Harrington
Hawkins
Hayes, Ind.
Hays, Ohio
Hechler, W. Va.
Heinz
Hicks
Holtzman
Howard
Howe
Hughes
Hungate
Johnson, Calif.
Jordan
Kastenmeier
Keys
Koch
Lehman
Long, La.
McFall
McHugh
Matsunaga
Mazzoli
Meeds
Meyner
Mezvinsky
Mikva
Miller, Calif.
Mineta
Minish
Mink
Mitchell, Md.
Moakley
Moffett
Morgan
Moss
Mottl
Murphy, Ill.
Murphy, N.Y.
Neal
Nedzi
Nichols
Metcalfe
Nix
Nolan

Nowak	Rogers	Stokes
Oberstar	Roncalio	Studds
Obey	Rooney	Thompson
Patterson, Calif.	Rose	Thornton
Pattison, N.Y.	Roybal	Traxler
Perkins	Russo	Tsongas
Pickle	St Germain	Udall
Pike	Santini	Vander Veen
Pressler	Sarbanes	Vanik
Preyer	Scheuer	Vigorito
Price	Schroeder	Waxman
Pritchard	Seiberling	Weaver
Randall	Shipley	Whalen
Rangel	Simon	Wilson, Tex.
Reuss	Solarz	Wolff
Richmond	Spellman	Yates
Rinaldo	Stanton, James V.	Yatron
Risenhoover	Stark	Young, Fla.
Rodino	Steelman	Zablocki

NOT VOTING—48

Ashley	Jones, Ala.	Rostenkowski
AuCoin	Jones, Tenn.	Sharp
Brodhead	Karth	Sisk
Brown, Ohio	Krueger	Staggers
Clay	Landrum	Steiger, Ariz.
Dent	Leggett	Stratton
Dingell	Litton	Stuckey
Eckhardt	Maguire	Sullivan
Esch	Moorhead, Pa.	Symington
Evins, Tenn.	O'Hara	Ullman
Fountain	O'Neill	Wampler
Giaimo	Ottinger	Wiggins
Hansen	Peyser	Wilson, C. H.
Helstoski	Riegle	Wirth
Hinshaw	Roe	Young, Ga.
Jenrette	Rosenthal	Zeferetti

The Clerk announced the following pairs:

On this vote:

Mr. Jones of Tennessee for, with Mr. O'Neill against.
Mr. Jenrette for, with Mr. Dent against.
Mr. Landrum for, with Mr. Zeferetti against.
Mr. Evins of Tennessee for, with Mr. Moorhead of Pennsylvania against.
Mr. Stuckey for, with Mr. Rostenkowski against.
Mr. Fountain for, with Mr. Staggers against.
Mr. Hansen for, with Mr. Rosenthal against.
Mr. Steiger of Arizona for, with Mr. Symington against.
Mr. Wampler for, with Mr. Charles H. Wilson of California against.
Mr. Wiggins for, with Mr. Sisk against.

So the amendment to the amendment in the nature of a substitute was agreed to.

The result of the vote was announced as above recorded.

AMENDMENT OFFERED BY MR. HORTON TO THE AMENDMENT IN THE NATURE OF A SUBSTITUTE OFFERED BY MR. FLOWERS

Mr. HORTON. Madam Chairman, I offer an amendment to the amendment in the nature of a substitute.

The Clerk read as follows:

Amendment offered by Mr. HORTON to the amendment in the nature of a substitute offered by Mr. FLOWERS: On page 9, line 23 through page 11, line 2, strike subsection (f) (1) and insert the following:

"(f)(1) For every meeting closed pursuant to paragraphs (1) through (10) of subsection (c), the General Counsel or chief legal officer of the agency shall publicly certify, that, in his opinion, the meeting may be closed to the public and shall state the relevant exemptive provision. A copy of such certification, together with a statement from the presiding officer of the meeting setting forth the date, time and place of the meeting, the persons present, the generic subject matter of the discussion at the meeting, and the actions taken, shall be incorporated into minutes retained by the agency."

On page 13, lines 2 and 3, strike "a transcript or electronic recording" and insert "the minutes".

On page 13, line 10, strike "transcript or electronic recording" and insert "minutes".

On page 15, lines 1 and 2, strike "transcripts or electronic recordings" and insert "minutes".

On page 15, lines 4 and 5, strike "transcripts and electronic recordings" and insert "minutes".

On page 15, line 13, strike "transcripts or electronic recordings" and insert "minutes".

Mr. HORTON. Madam Chairman, this amendment would delete the verbatim transcript requirement of the bill and replace it with a requirement that minutes be kept of each closed meeting and retained by the Agency.

The bill now requires that a verbatim recording or transcript be made of every meeting which is legally closed under the narrow exemptions contained in the act.

As presently written, this is the most onerous and contradictory provision in the bill. The bill seeks on the one hand to guard against the potential havoc of unrestricted public exposure of agency deliberations by providing 10 exemptions from the requirement for open meetings, but on the other hand it effectively destroys the protection provided by closed meetings by requiring a verbatim transcript which could later lead to public disclosure.

The provision defeats the very purpose of the Freedom of Information Act and the Federal Privacy Act, which properly recognize the need to keep certain categories of information from premature or damaging publication.

Thus agency meetings held to hear preliminary staff reports on SEC stock fraud investigations, Federal Reserve Board bank examination activities, FTC antitrust investigations, Civil Service Commission disciplinary actions, and a host of similarly sensitive situations would be subject to publication of edited verbatim transcripts. No seasoned reporter or counsel for an affected party would have much trouble piecing together what an agency was up to if this procedure is required in the bill.

Proponents of the sunshine legislation repeatedly state that the bill's transcript requirements are essential to provide effective judicial review of agency action in closed meetings. It is my belief, which is shared by others, that this is not the case. The discovery proceedings available to the U.S. district courts do not depend upon the availability of verbatim transcripts or electronic recordings of agency meetings. Deputy Attorney General Harold R. Tyler, Jr., a former Federal judge (D.C., S.D., N.Y.), described the transcript provision in testimony before the House Government Operations Committee as "undoubtedly the most wasteful provision in the bill." He noted that—

A transcript is not needed to secure judicial review of an improper closure, any more than it is needed to secure judicial review of other improper agency action. Any court can require the agency to supply an affidavit, under oath, as to what was discussed.

The transcript provision will be highly expensive to implement in terms of actual costs and time of agency members. It will result in voluminous paperwork and unnecessary accumulation of highly sensitive documents. It will be a constant source of litigation and an ever-present source of conjecture and speculation.

Moreover, the key sponsors of this bill stated from the outset that the sunshine bill is based on the experience of State sunshine laws. However, not a single State sunshine or open meetings law contains any requirement for verbatim transcripts. This provision is strictly an invention of the bill's sponsors and supporters at the Federal level.

I see no reason for the Federal Government to take such unprecedented action.

I see no reason why this provision should be maintained in the legislation we are considering and urge support for my amendment which would delete the verbatim transcript requirement and replace it with a requirement that minutes be kept of each closed meeting and retained by the agency. Such minutes would obviously be available for subpena and in camera examination in any court action brought to determine whether the open meeting provision of the sunshine law has been violated. Therefore, eliminating the transcript requirement would in no way weaken the enforceability of the open meeting provisions.

I urge the adoption of my amendment.

The CHAIRMAN. The time of the gentleman from New York (Mr. HORTON) has expired.

(By unanimous consent, Mr. HORTON was allowed to proceed for 2 additional minutes.)

Mr. PEPPER. Madam Chairman, will the gentleman yield?

Mr. HORTON. I yield to the gentleman from Florida.

Mr. PEPPER. I thank the gentleman for yielding.

Does the amendment offered by the able gentleman cover anything other than the Federal Reserve Board?

Mr. HORTON. It covers all agencies. What it does is to remove the restrictions of a verbatim transcript, and it also covers the Federal Reserve Board.

Mr. PEPPER. If the gentleman will yield further, does the able gentleman propose to offer another amendment limiting his amendment only to the Federal Reserve Board?

Mr. HORTON. I would not offer that if this carries, and I would hope that this amendment carries because it would cover the Federal Reserve Board, the SEC, and any other agency as defined in this title.

Ms. ABZUG. Madam Chairman, I move to strike the last word.

(Ms. ABZUG asked and was given permission to revise and extend her remarks.)

Ms. ABZUG. Madam Chairman, I rise in opposition to the amendment, which has been rejected by both subcommittees and both full committees that have considered this legislation. H.R. 11656 generally requires that a transcript or electronic recording be kept of each closed meeting. In recognition of the fact that some agencies have a high volume of ordinary adjudicatory proceedings, transcripts are not required for closed meetings that discuss such proceedings or civil actions in which the agency is involved.

Under the scheme of this legislation, the existence of a transcript of a closed meeting has two critical functions. First, a meeting closed

with the reasonable expectation that exempt material will be discussed will in many instances turn out to have little or no such discussion. The existence of a transcript or electronic recording will permit the agency to make public those portions of the discussion that do not contain exempt information.

Second, the existence of a transcript is the primary potential remedy for a litigant who proves to a court that a meeting was unlawfully closed. Since any court ruling will almost always come long after the meeting is held, and since a plaintiff suing only under this act will not be able to overturn the substantive action taken at an unlawfully closed meeting, what remedy has he other than to have the transcripts made available to him? I note in this connection that although the judicial review provisions of this legislation permit the court to make the transcript public if the meeting was unlawfully closed, the court would not disclose discrete items contained within such a transcript which are themselves of an exempt character. For example, if a meeting were closed because of a purported discussion of trade secrets and a court later ruled that the agency did not have a proper basis for this closing, the court would not release the small portion of the transcript that contained a reference to some irrelevant personal proclivity of an individual who was the subject of the discussion, since that would be protected by the bill's personal privacy exemption.

As for the fact that few, if any States require transcripts, it should be noted that 24 of the 49 State open meeting statutes provide criminal penalties for violations, 2 more impose civil penalties, and 19 render the substantive action taken at an unlawful closed meeting void or voidable. None of these sanctions is available under this bill, leaving the possible disclosure of the transcript as the only remedy for an improper closing.

On the question of cost, given the fact that most meetings are supposed to be open under this legislation, there should not be all that many transcripts to keep. The Congressional Budget Office, both House committees that have considered the bill, and the Senate Government Operations Committee have all estimated that the average annual cost of this legislation will be less than $3,000 for each covered agency.

This amendment would remove the only enforcement remedy contained in the open meeting provisions of the sunshine bill, and I urge its rejection.

Mr. McCloskey. Madam Chairman, I rise in support of the amendment.

(Mr. McCloskey asked and was given permission to revise and extend his remarks.)

Mr. McCloskey. Madam Chairman, there are two aspects that the chairman of the subcommittee, the gentlewoman from New York (Ms. Abzug) pointed out. She spoke of litigation, and it is quite clear that unless this amendment is adopted, this legislation provides a great case for litigation against the Federal Government in nearly every matter in which the Government operates, because of the lure of obtaining and making public information on the private meetings that are held on the subjects we have exempted, including national security matters, personnel matters, patent matters, and stability of financial institutions. The very reason why we should hold these matters private is to accomplish competent government in these fields.

When the gentlewoman speaks of litigation, I think we can see basically the reason why this section is in the bill. It is to permit additional litigation against the Government.

We have seen much litigation in both the Privacy Act and the Freedom of Information Act, which are still in a shakedown process to see whether the benefits of those acts do not impose an undue burden on the Government. We have seen immense litigation in these areas.

I suggest that this verbatim transcript requirement, which is not found in any State law in this country—no Sunshine Act requires a verbatim transcript of private meetings—would be a fruitful source of litigation.

Secondly, let me submit this to my colleagues: Would we impose this on ourselves as Members of Congress? Would we require that all of our discussions of congressional business that are conducted privately be held subject to a full verbatim transcript?

There is no right to revise and extend here. There is no privilege in a verbatim transcript of a collegial meeting to go back and take out the words we thought were wrong. This is a verbatim transcript. This would in effect remove from the Members of the House of Representatives, if we imposed this on ourselves, the right to go back and correct our errors of grammar, our errors of syntax, or our errors when perhaps we went too far in our characterization of a colleague.

There is one final matter, and this goes back to ordinary human experience. Many of us were practicing attorneys in small towns.

If a person came to us and said, "Would you give me a recommendation as to a fellow attorney who can handle a will or a divorce or a criminal action," all of us will give a candid and truthful response: "No." We would say, "That man is corrupt" or "That man is incompetent."

However, would we give that same candid response if we knew that the verbatim words that we spoke in advising as to a fellow colleague were going to be in a record that might eventually be subpenaed and made public?

This has an immensely chilling effect on the kind of derogatory but truthful comment that an agency like the SEC must consider when they consider taking the stock of a company off the trading market because the vice president of the company is dishonest.

What person is going to say in an open meeting or in a closed meeting of which a verbatim transcript is being made, "I believe that man is crooked, for these reasons, A, B, and C, and therefore, we ought to take this stock off the market"?

Madam Chairman, in my judgment, this balance we seek between truth and candor on the part of a regulatory agency and the openness of their records is such that in this case the balance, in my judgment, comes down to the point where we should not require a verbatim transcript of the very meeting which we feel should be held privately in order to give people the opportunity to make candid and truthful comments.

Mr. SEIBERLING. Madam Chairman, will the gentleman yield?

Mr. MCCLOSKEY. I yield to the gentleman from Ohio.

Mr. SEIBERLING. Madam Chairman, I think it is too bad that the author of this amendment has such a good advocate, because I think the merits of the amendment are far less than the gentleman's statement really justifies.

In the first place, we have already adopted an amendment that says that two persons can meet together and discuss anything they want without its being in the bill.

In the second place, if there is a meeting of members of the executive branch of the Government, which is comparable to a court in terms of its importance—many times it is a quasi-judicial body—then it should all be on the record. It is not the same as our deliberation.

Mr. McCloskey. Let us take the case of our own Congressional Record. Would the gentleman say that our verbatim transcripts should not be subject to revision?

Mr. Seiberling. This is a legislative body, and our function is entirely different.

The Chairman. The time of the gentleman from California (Mr. McCloskey) has expired.

(On request of Mr. Drinan and by unanimous consent, Mr. McCloskey was allowed to proceed for 2 additional minutes.)

Mr. Drinan. Madam Chairman, will the gentleman yield?

Mr. McCloskey. I yield to the gentleman from Massachusetts.

Mr. Drinan. Madam Chairman, I appreciate the gentleman's argument, but how do we respond, again, if we get only minutes of a meeting held in secret? Then how can anyone ever establish the question of whether or not they had the right to go into a secret session and decide the fate of something very important?

Mr. McCloskey. I do not think that the question of whether they have a right to go into secret session has anything to do with what they say in the secret session.

Mr. Drinan. But if we have only minutes and not the transcript, how could anybody establish whether or not they had the right to do this in secret and come to the decisions which they came to, because there is absolutely no discussion; there is no provision for a transcript; there is nothing but summarized minutes? That could leave the petitioner whose fate is decided in secret without any recourse.

Mr. McCloskey. What the gentleman says is properly so. That has been the law in this country for 200 years.

There is no city, county, State, agency, or any other body in government that is required to keep a verbatim transcript of a private meeting.

Would anyone urge that the Congress of the United States ought to impose upon the Federal Government a requirement that has not been imposed on any agency of government in this country for 200 years?

Mr. Drinan. If the gentleman would yield further, this is a private meeting conducted in private by people who say they have a right to go into private session, and we have no facts on which we can base a decision on the initial question of whether they have a right to go into a private session.

Mr. McCloskey. I know the gentleman from Massachusetts (Mr. Drinan) looks forward to a new Democratic administration. However, I submit, is there any other government in the world, except this new administration, on which this requirement will be imposed?

The Chairman. The time of the gentleman from California (Mr. McCloskey) has again expired.

(On request of Mr. Horton and by unanimous consent, Mr. McCloskey was allowed to proceed for 2 additional minutes.)

Mr. LEVITAS. Madam Chairman, will the gentleman yield?

Mr. MCCLOSKEY. I yield to the gentleman from Georgia.

Mr. LEVITAS. Madam Chairman, I thank the gentleman for yielding.

Would the gentleman agree with me, in response to the observations made just now by our distinguished colleague, the gentleman from Massachusetts (Mr. DRINAN), that the sunshine laws, which have been in existence for a number of years in many States, including my own, have worked effectively? There have been opportunities for aggrieved parties to show that meetings were improperly held, without the necessity of the transcript, and that that is a sufficient answer to the need to protect the person who would otherwise be aggrieved.

However, let me explore this a little bit further.

Do I understand that this would require the chiefs of staff meeting in a secret session on national security matters to maintain a transcript?

Mr. MCCLOSKEY. That is correct. If they are in a commission or a committee and a committee as defined by law is an agency, it would require a verbatim transcript, a recorded vote to close the meeting, and a transcript of the meeting which might ultimately be made available to the public.

My primary objection to this is that if we are going to test whether a verbatim transcript is helpful or harmful, we should not do so with every agency of a Federal Government which has had absolutely no experience at all in holding such hearings. If we wanted to test this as an experiment as to whether an agency might operate better through such a procedure that we should have the Federal Reserve Board or the Securities and Exchange Commission be required to do this. But this is a blanket requirement on all agencies of the Government, and we have had no experience at all. We have no estimates as to what the costs will be. We will be starting into a whole new profession, that of transcribing and reporting these agencies' procedures.

Also, Madam Chairman, bear in mind that every member of the Commission is going to spend a day deliberating in the Commission and then spend a day reviewing what they said in the meeting. The paperwork involved and the complexity of these transcripts is going to be stupendous.

The CHAIRMAN. The time of the gentleman has again expired.

(On request of Mr. HORTON, and by unanimous consent, Mr. MCCLOSKEY was allowed to proceed for 2 additional minutes.)

Mr. HORTON. Madam Chairman, will the gentleman yield?

Mr. MCCLOSKEY. I yield to the gentleman from New York.

Mr. HORTON. Madam Chairman, I think the question that was posed by the gentleman from Massachusetts (Mr. DRINAN) went to the question of what can we do without a transcript in the event we want to go to court to test whether or not the meeting should have been closed? I think that is a good question. The answer is that that is done all of the time now. The court can, in camera, examine the proceedings, can get the minutes of the meeting, examine them, get the testimony of those who were present by whatever means are available. But the onerous requirement of having a transcript it seems to me is out of order insofar as the type of meetings we are talking about and the publication or making available the transcript.

Mr. MCCLOSKEY. I thank the gentleman.

Mr. BROOKS. Madam Chairman, I move to strike the requisite number of words, and I rise in opposition to the amendment to the amendment in the nature of a substitute.

(Mr. BROOKS asked and was given permission to revise and extend his remarks.)

Mr. BROOKS. Madam Chairman, the requirement that the Government agencies keep a transcript of their closed meeting follows very closely the procedures of many congressional committees. I see no reason why a Government agency could not keep a transcript through equipment that my 9-year-old boy has and can operate. It does not take any special talent as equipment.

In my opinion it is just the desire to keep permanently secret these Government activities of these agencies. But I say, Madam Chairman, that just because a meeting is closed is no reason that an official record of the business could not be and should not be kept. The decision to close the meeting may well have been made at an earlier meeting and if that is later reversed, then it is imperative that a transcript be available if the aims of any "sunshine" legislation are to be met.

Mr. FASCELL. Madam Chairman, I move to strike the requisite number of words, and I rise in opposition to the amendment to the amendment in the nature of a substitute.

Madam Chairman, the one government in the world that deals with transcripts is the Congress of the United States. I will say to my distinguished colleague, the gentleman from California (Mr. MCCLOSKEY). We probably have more transcripts around here than any place else in the world and it is a darned good thing that we do. I will tell the Members, because we would not know what was going on if we did not have the transcripts.

I think it would be very helpful for every agency downtown, instead of having somebody keep minutes that simply say that they met and then the meeting was adjourned, that there be a transcript made so that we would know what was going on.

It seems to me it is very sensible for a government agency to have an official record of its actions in the nature of a transcript, even if it is locked up in its safe. Somewhere there ought to be an official record of the transaction of the business of a body of our Government that deals with the lives of millions of people. There ought to be that transcript somewhere. To say that the mere keeping of minutes is a sufficient substitute is to beg the question.

Let us talk about the fear that has been expressed that in some way the agency is going to be dragged into court, or that State agencies do not now require transcript keeping. The difference in the State agencies is that they have substantive penalties. They can undo the action of the agency when they go to court. No such penalty is provided in this bill.

The critical issue is the public's right to know. How does a transcript come to play in that, and is the fear real that in some way some person with derogatory information might get that information out? The answer is, "No." Why is that?

The plaintiff has the burden of proving his lawsuit that the agency meeting was improperly closed to start with. He has that burden. The relief that is granted under this bill, which is that information which should be released will be released. But the protection in the bill that is provided here is ample and adequate to allay the fears that have been expressed, because it says that the judge can only release that information which should be made public. Any information which would be properly withheld under one of the classifications or exemptions in the bill, the judge would have no right to release.

We cannot be held responsible for leaks in the agencies, if there is a fear that the stuff is going to get out. It is getting out now—the individual Members' copies of the minutes, documents, and papers. The transcript, whether it exists or not, is not going to solve the problem downtown. It is not going to give them any more or less protection.

The issue that is involved is that without the transcript the judge cannot really make a determination whether the plaintiff is entitled to his rights under this bill. What does he get when he gets all of it? What does he get out of it? Do the Members know what he gets? He gets the information which the public should have had in the first place. Why deny him that right? The whole purpose of the pending amendment is simply to do away with the transcripts, to make it absolutely almost impossible that any citizen of the United States would have the right ever to say, "I think that meeting was improperly closed. There is some information there which should have been made public." The court might say, "There is something there that ought to be made public." If it was not classified under this bill or some other law, the judge could release it. But if under this law it is properly exempted, or under some other law it is properly withheld, the judge has no discretion to release that information. The only information he can release is that information which should have been made public in the first instance. And the plaintiff, the citizen, had to go to all of the trouble to bring that suit. Now the gentleman wants to deny him with this amendment the right to the transcript. He wants to deny to the Government and to the Congress the official record, which could be kept locked up in the Government's safe, never to be seen by anybody unless in some way they have violated the law.

The CHAIRMAN. The time of the gentleman has expired.

(At the request of Mr. EVANS of Colorado, and by unanimous consent, Mr. FASCELL was allowed to proceed for 2 additional minutes.)

Mr. EVANS of Colorado. Madam Chairman, will the gentleman yield?

Mr. FASCELL. I will be glad to yield to the gentleman from Colorado.

Mr. EVANS of Colorado. I thank the gentleman for yielding.

One thing that concerns me is the comment that the gentleman made about some citizen's rights being adversely affected in a private meeting and not being able to prove whether or not the meeting should or should not have been private unless he has got a transcript. It seems to me that correctness of the privacy of the meeting is determined by the action taken, that is, the ultimate action taken. What conversation went into the ultimate action that was taken is something else again, and I am a little concerned about feeling that the conversations behind the action are going to be the things that measure whether or not the action taken, of which he complains, was wrong to be taken in a private meeting.

Mr. FASCELL. Madam Chairman, I can say this to the gentleman: that the only way we can ever make the determination is for the plaintiff to bring a lawsuit and the judge to make a decision. The court is going to have to make that decision. If the transcript is available, the judge sees it "in camera" and then decides whether the transcript or any part of it is properly withholdable. If it is, it is not released. If he decides the information was improperly withheld, he has the discretion to release the information which should have been made public in the first instance or he can issue an injunction against the agency.

The CHAIRMAN. The question is on the amendment offered by the gentleman from New York (Mr. HORTON) to the amendment in the nature of a substitute offered by the gentleman from Alabama (Mr. FLOWERS).

The question was taken; and the Chairman announced that the noes appeared to have it.

RECORDED VOTE

Mr. HORTON. Madam Chairman, I demand a recorded vote.

A recorded vote was ordered.

The vote was taken by electronic device, and there were—ayes 201, noes 193, not voting 38, as follows:

[Roll No. 562]

AYES—201

Abdnor
Adams
Anderson, Ill.
Andrews, N.C.
Andrews, N. Dak.
Archer
Armstrong
Ashbrook
Ashley
Beard, Tenn.
Bell
Biaggi
Biester
Boggs
Bowen
Breckinridge
Brinkley
Broomfield
Brown, Mich.
Brown, Ohio
Broyhill
Buchanan
Burgener
Burke, Fla.
Burelson, Tex.
Butler
Byron
Carter
Cederberg
Chappell
Clancy
Clausen, Don H.
Clawson, Del.
Cochran
Collins, Tex.
Conable
Conlan
Coughlin
Daniel, Dan
Daniel, R. W.
Davis
de la Garza
Delaney
Derrick
Derwinski
Devine
Dickinson
Downing, Va.
Duncan, Oreg.
Duncan, Tenn.
du Pont
Eckhardt
Edwards, Ala.
English
Erlenborn
Eshleman
Evans, Colo.
Fary
Fenwick
Findley
Fish
Flynt
Foley
Forsythe
Frenzel
Frey
Gaydos
Ginn
Goldwater
Goodling
Gradison
Guyer
Haley
Hall, Tex.
Hammerschmidt
Hanley
Harsha
Hays, Ohio
Heckler, Mass.
Hefner
Henderson
Hillis
Holland
Holt
Horton
Hubbard
Hungate
Hutchinson
Hyde
Ichord
Jarman
Jeffords
Jenrette
Johnson, Pa.
Jones, N.C.
Jones, Okla.
Jordan
Kasten
Kelly
Ketchum
Kindness
Krueger
LaFalce
Lagomarsino
Latta
Lent
Levitas
Lloyd, Tenn.
Lott
Lujan
Lundine
McClory
McCloskey
McCollister
McCormack
McDade
McEwen
McKay
McKinney
Madigan
Mahon
Mann
Martin
Mathis
Michel
Mikva
Milford
Miller, Ohio
Mills
Mitchell, N.Y.
Mollohan
Montgomery
Moore
Moorhead, Calif.
Mosher
Murphy, Ill.
Murtha
Myers, Ind.
Myers, Pa.
Natcher
Nedzi
O'Brien
Passman
Pepper
Pettis
Pickle
Poage

Pritchard
Quie
Quillen
Railsback
Rees
Regula
Rhodes
Risenhoover
Roberts
Robinson
Runnels
Ruppe
Ryan
Sarasin
Satterfield
Schneebeli
Schulze
Sebelius
Shriver
Shuster
Sikes
Skubitz
Slack
Smith, Nebr.
Snyder
Spence
Stanton, J. William
Steed
Steiger, Wis.
Stephens
Talcott
Taylor, Mo.
Taylor, N.C.
Teague
Thone
Thornton
Treen
Ullman
Van Deerlin
Vander Jagt
Waggonner
Walsh
White
Whitehurst
Whitten
Wilson, Bob
Wilson, Tex.
Winn
Wright
Wydler
Wylie
Young, Alaska
Young, Tex.
Zablocki

NOES—193

Abzug
Addabbo
Alexander
Allen
Ambro
Anderson, Calif.
Annunzio
Aspin
AuCoin
Badillo
Bafalis
Baldus
Baucus
Bauman
Beard, R.I.
Bedell
Bennett
Bergland
Bevill
Bingham
Blanchard
Blouin
Boland
Bolling
Bonker
Brademas
Breaux
Brodhead
Brooks
Brown, Calif.
Burke, Calif.
Burke, Mass.
Burlison, Mo.
Burton, Phillip
Carney
Carr
Chisholm
Cleveland
Cohen
Collins, Ill.
Conte
Conyers
Corman
Cornell
Cotter
Crane
D'Amours
Daniels, N.J.
Danielson
Dellums
Dingell
Dodd
Downey, N.Y.
Drinan
Early
Edgar
Edwards, Calif.
Eilberg
Emery
Evans, Ind.
Fascell
Fisher
Fithian
Flood
Florio
Flowers
Ford, Mich.
Ford, Tenn.
Fraser
Fuqua
Gibbons
Gilman
Gonzalez
Grassley
Green
Gude
Hagedorn
Hall, Ill.
Hamilton
Hannaford
Harkin
Harrington
Harris
Hawkins
Hayes, Ind.
Hechler, W. Va.
Heinz
Hicks
Holtzman
Howard
Howe
Hughes
Jacobs
Johnson, Calif.
Johnson, Colo.
Kastenmeier
Kazen
Kemp
Keys
Koch
Krebs
Lehman
Lloyd, Calif.
Long, La.
Long, Md.
McDonald
McFall
McHugh
Madden
Maguire
Matsunaga
Mazzoli
Meeds
Melcher
Metcalfe
Meyner
Mezvinsky
Miller, Calif.
Mineta
Minish
Mink
Mitchell, Md.
Moakley
Moffett
Moorhead, Pa.
Morgan
Moss
Mottl
Murphy, N.Y.
Neal
Nichols
Nix
Nolan
Nowak
Oberstar
Obey
Ottinger
Patten, N.J.
Patterson, Calif.
Pattison, N.Y.
Paul
Perkins
Pike
Pressler

Preyer
Price
Randall
Rangel
Richmond
Rinaldo
Rodino
Rogers
Roncalio
Rooney
Rose
Rosenthal
Roush
Rousselot
Roybal
Russo
St Germain
Santini
Sarbanes
Scheuer
Schroeder
Seiberling
Sharp
Shipley
Simon
Smith, Iowa
Solarz
Spellman
Staggers
Stark
Steelman
Stokes
Studds
Symms
Thompson
Traxler
Tsongas
Udall
Vander Veen
Vanik
Vigorito
Waxman
Weaver
Whalen
Wirth
Wolff
Yates
Yatron
Young, Fla.

NOT VOTING—38

Burton, John
Clay
Dent
Diggs
Esch
Evins, Tenn.
Fountain
Giaimo
Hansen
Hébert
Helstoski
Hightower
Hinshaw
Jones, Ala.
Jones, Tenn.
Karth
Landrum
Leggett
Litton
O'Hara
O'Neill
Peyser
Reuss
Riegle
Roe
Rostenkowski
Sisk
Stanton, James V.
Steiger, Ariz.
Stratton
Stuckey
Sullivan
Symington
Wampler
Wiggins
Wilson, C. H.
Young, Ga.
Zeferetti

The Clerk announced the following pairs:

Mr. Hébert for, with Mr. O'Neill against.
Mr. Landrum for, with Mr. Dent against.
Mr. Steiger of Arizona for, with Mr. Zeferetti against.
Mr. Wampler for, with Mr. John Burton against.

Mr. Nedzi and Mr. Mikva changed their vote from "no" to "aye."

Mr. McDonald and Mr. Rousselot changed their vote from "aye" to "no."

So the amendment to the amendment in the nature of a substitute was agreed to.

The result of the vote was announced as above recorded.

AMENDMENT OFFERED BY MR. MOSS TO THE AMENDMENT IN THE NATURE OF A SUBSTITUTE OFFERED BY MR. FLOWERS

Mr. Moss. Madam Chairman, I offer an amendment to the amendment in the nature of a substitute.

The Clerk read as follows:

Amendment offered by Mr. Moss to the amendment in the nature of a substitute offered by Mr. FLOWERS: Page 19, after line 12, add to section 5 the following new subsection:

"(c) Subsection (d) of section 10 of the Federal Advisory Committee Act is amended by striking out the first sentence and inserting in lieu thereof the following: "Subsections (a)(1) and (a)(3) of this section shall not apply to any portion of an advisory committee meeting where the President, or the head of the agency to which the advisory committee reports, determines that such meeting may be closed to the public in accordance with subsection (c) of section 552b of title 5, United States Code"."

Mr. Moss. Madam Chairman, the amendment is straightforward. It would cure an oversight in the Federal Advisory Committee Act. That act regulates, among other things, the organization, makeup, and openness of the many advisory committees which provide information and counsel to agencies of our Government. Unfortunately, the Federal Advisory Committee Act regulates public access to meetings of public advisors to agencies pursuant to the Freedom of Information Act, an act designed to regulate the disclosure of documents.

On its face, this is an inappropriate cross-reference in that act. But it was required when the Advisory Committee Act was passed because there did not exist at that time a measure which regulated meetings. With the consideration by the House of H.R. 11656, this is no longer the case. In substance, my amendment merely provides that the carefully crafted standards regulating openness of meetings contained in the sunshine bill will be made applicable to Federal advisory committees.

I understand that this amendment is acceptable to the committee and I yield the balance of my time to the Honorable Bella Abzug for the purpose of receiving the views of the committee on this matter.

Mr. Horton. Madam Chairman, will the gentleman yield?

Mr. Moss. I yield to the gentleman from New York.

Mr. Horton. Madam Chairman, the gentleman has presented the amendment to us, and I have gone over it. The minority will be very happy to accept the amendment. I believe it improves the bill.

Mr. Moss. Madam Chairman, I thank the gentleman.

Ms. Abzug. Madam Chairman, will the gentleman yield?

Mr. Moss. I yield to the gentlewoman from New York.

Ms. Abzug. Madam Chairman, this is essentially a conforming amendment which would reflect in the Federal Advisory Committee Act the enactment of the sunshine bill.

When the Advisory Commitee Act was enacted in 1972, we did not have a general open meeting law. As a result, that act provided that meetings of advisory committees were to be governed by the exemptions in the Freedom of Information Act. The FOIA exemptions, though, are designed for documents rather than for meetings, and there have been a number of difficulties arising from that discrepancy. Now that we are enacting this open meeting legislation, which contains exemptions like those in the Freedom of Information Act, but tailored especially for meetings, we should apply these exemptions to the Advisory Committee Act as well. That is exactly what this amendment would do, and I am pleased to support it.

Mr. Flowers. Madam Chairman, will the gentleman yield?

Mr. Moss. I yield to the gentleman from Alabama.

Mr. Flowers. Madam Chairman, the gentleman from California (Mr. Moss) has gone over this amendment with us, and we have absolutely no objection to it. We concur in the amendment and are glad to accept it.

Mr. Moss. Madam Chairman, I thank the gentleman and I yield back the balance of my time.

The Chairman. The question is on the amendment offered by the gentleman from California (Mr. Moss) to the amendment in the nature of a substitute offered by the gentleman from Alabama (Mr. Flowers).

The amendment to the amendment in the nature of a substitute was agreed to.

AMENDMENT OFFERED BY MR. MOORHEAD OF CALIFORNIA TO THE NATURE OF A SUBSTITUTE OFFERED BY MR. FLOWERS

Mr. MOORHEAD of California. Madam Chairman, I offer an amendment in the nature of a substitute.

The Clerk read as follows:

Amendment offered by Mr. Moorhead of California to the amendment in the nature of a substitute offered by Mr. Flowers:

On page 12, line 8, delete "by".

On page 12, line 9, delete "any person".

Mr. MOORHEAD of California. Madam Chairman, the bill as it is presently written permits any person, whether that person has an interest or not, to bring legal action to enforce the provisions of this legislation.

Our courts in this country are already tremendously overcrowded. Under the normal rule and under the present law in this country pertaining to courts, in all actions brought, except for a very few exceptions, the plaintiff must make some showing of specific harm to his interests.

There are certain professional litigators in this country who love to get into court and who try to find any kind of excuse to get into court, whether they have a reason for going to court or not. At the same time we have people who are failing to get their day in court on civil actions and who are delayed from month to month because of overcrowding in the courts. We have recently had a situation where many of the criminal defendants in the country who were indicted had to have their cases dismissed because they could not be brought to court on time.

We do not need this kind of delay built into our system. I think it is most important that under this legislation the same requirements for going to court should prevail as would prevail in any other kind of action.

This amendment would simply require that a defendant who brought the action make some showing that he has been hurt in some way, even though very slightly. If he would have had the door closed on him or if he wanted to be in the room when a hearing was held and had been kept out because it was a closed meeting, he would have a cause of action, but a person who was nowhere near the hearing and showed no interest in it would not have a cause of action.

Madam Chairman, I ask that the amendment be adopted.

Ms. ABZUG. Madam Chairman, I move to strike the last word, and I rise in opposition to the amendment.

(Ms. ABZUG asked and was given permission to revise and extend her remarks.)

Ms. ABZUG. Madam Chairman, I rise in opposition to the amendment. The sunshine bill is designed to let any citizen see what agencies are doing by attending their meetings.

This bill is not designed for the benefit of those who are parties to agency proceedings, but for the benefit of all members of the public who want to know what the agencies are doing and how they go about making the decisions that affect all of our lives so pervasively. We cannot very well tell our constituents, "We are giving you the right to attend agency meetings, but you may not seek redress if an agency denies you that right." Unfortunately, that is exactly what this amendment would do.

The bill before you does not allow a citizen plaintiff to nullify the substantive action taken at an unlawfully closed meeting. The most that he can get is access to the transcript of the meeting and a court order prohibiting the agency from closing meetings on the grounds in question.

This concept of citizen standing is not a new one. It is in the Freedom of Information Act, which is now a decade old, and also in the Privacy Act. Those who have suggested that the standing provisions contained in the bill raise constitutional questions are not correct in their interpretation. The fact that the statute gives any person the right to attend an agency meeting confers standing sufficient to satisfy the constitutional requirements of article III.

We are giving any member of the public the right to attend agency meetings. To say the very least, it would be a gross misrepresentation and a cruel hoax on our part to at the same time prevent those to whom this right is given from taking any action to enforce it.

The amendment should be defeated.

The CHAIRMAN. The question is on the amendment offered by the gentleman from California (Mr. MOORHEAD) to the amendment in the nature of a substitute offered by the gentleman from Alabama (Mr. FLOWERS).

The question was taken; and the Chairman announced that the noes appeared to have it.

RECORDED VOTE

Mr. MOORHEAD of California. Madam Chairman, I demand a recorded vote.

A recorded vote was ordered.

The vote was taken by electronic device, and there were—ayes 134, noes 258, not voting 40, as follows:

[Roll No. 563]

AYES—134

Abdnor
Anderson, Ill.
Andrews, N.C.
Andrews, N. Dak.
Archer
Armstrong
Ashbrook
Ashley
Bell
Bowen
Brinkley
Broomfield
Brown, Mich.
Brown, Ohio
Broyhill
Burgener
Burke, Fla.
Burleson, Tex.
Butler
Byron
Carter
Cederberg
Chappell
Clancy
Clausen, Don H.
Clawson, Del
Cochran
Collins, Tex.
Conable
Conlan
Daniel, Dan
Daniel, R. W.
Davis
Devine
Dickinson
Downing, Va.
Duncan, Oreg.
Edwards, Ala.
Emery
Erlenborn
Forsythe
Gaydos
Ginn
Goldwater
Goodling
Guyer
Hagedorn
Haley
Hall, Tex.
Hammer-schmidt
Harsha
Hays, Ohio
Hefner
Hillis
Holt
Horton
Hutchinson
Hyde
Ichord
Jarman
Jenrette
Johnson, Pa.
Jones, N.C.
Kazen
Kelly
Kemp
Ketchum
Kindness
Lagomarsino
Latta
Lent
Lott
Lujan
McClory
McCloskey
McCollister
McDonald
McEwen

McKay
Martin
Mathis
Michel
Milford
Miller, Ohio
Mills
Mollohan
Montgomery
Moore
Moorhead, Calif.
Murtha
Myers, Ind.
O'Brien
Passman
Pettis
Pickle
Poage
Quie
Regula
Roberts
Robinson
Rousselot
Runnels
Ruppe
Satterfield
Schneebeli
Schulze
Sebelius
Shipley
Shriver
Shuster
Sikes
Skubitz
Slack
Smith, Nebr.
Snyder
Spence
Stanton, J. William
Talcott
Taylor, Mo.
Taylor, N.C.
Teague
Treen
Ullman
Vander Jagt
Waggonner
White
Whitehurst
Whitten
Wilson, Bob
Winn
Wydler
Wylie
Young, Alaska
Young, Fla.

NOES—258

Abzug
Adams
Addabbo
Alexander
Allen
Ambro
Anderson, Calif.
Annunzio
Aspin
AuCoin
Badillo
Bafalis
Baldus
Baucus
Bauman
Beard, R.I.
Beard, Tenn.
Bedell
Bennett
Bergland
Bevill
Biaggi
Biester
Bingham
Blanchard
Blouin
Boggs
Boland
Bolling
Bonker
Brademas
Breaux
Breckinridge
Brodhead
Brooks
Brown, Calif.
Buchanan
Burke, Calif.
Burke, Mass.
Burlison, Mo.
Burton, Phillip
Carney
Carr
Chisholm
Cleveland
Cohen
Collins, Ill.
Conte
Conyers
Corman
Cornell
Cotter
Coughlin
Crane
D'Amours
Daniels, N.J.
Danielson
de la Garza
Delaney
Dellums
Derrick
Derwinski
Diggs
Dingell
Dodd
Downey, N.Y.
Drinan
Duncan, Tenn.
du Pont
Early
Eckhardt
Edgar
Edwards, Calif.
Eilberg
English
Evans, Colo.
Evans, Ind.
Fary
Fascell
Fenwick
Findley
Fish
Fisher
Fithian
Flood
Florio
Flowers
Flynt
Foley
Ford, Mich.
Ford, Tenn.
Fraser
Frenzel
Frey
Fuqua
Giaimo
Gibbons
Gilman
Gonzalez
Gradison
Grassley
Green
Gude
Hall, Ill.
Hamilton
Hanley
Hannaford
Harkin
Harrington
Harris
Hayes, Ind.
Hechler, W. Va.
Heckler, Mass.
Heinz
Hicks
Holland
Holtzman
Howard
Howe
Hubbard
Hughes
Hungate
Jacobs
Jeffords
Johnson, Calif.
Johnson, Colo.
Jones, Okla.
Jordan
Kasten
Kastenmeier
Keys
Koch
Krebs
Krueger
LaFalce

Leggett
Lehman
Levitas
Lloyd, Calif.
Lloyd, Tenn.
Long, La.
Long, Md.
Lundine
McCormack
McDade
McFall
McHugh
McKinney
Madden
Madigan
Maguire
Mahon
Mann
Matsunaga
Mazzoli
Meeds
Melcher
Metcalfe
Meyner
Mezvinsky
Mikva
Miller, Calif.
Mineta
Minish
Mink
Mitchell, Md.
Mitchell, N.Y.
Moakley
Moffett
Moorhead, Pa.
Morgan
Mosher
Moss
Mottl
Murphy, Ill.
Murphy, N.Y.
Myers, Pa.
Natcher
Neal
Nedzi
Nichols
Nix
Nolan
Nowak
Oberstar
Obey
Ottinger
Patten, N.J.
Patterson, Calif.
Pattison, N.Y.
Paul
Pepper
Perkins
Pike
Pressler
Preyer
Price
Pritchard
Quillen
Railsback
Randall
Rees
Richmond
Rinaldo
Risenhoover
Rodino
Rogers
Roncalio
Rooney
Rose
Rosenthal
Roush
Roybal
Russo
Ryan
St Germain
Santini
Sarasin
Sarbanes
Scheuer
Schroeder
Seiberling
Sharp
Simon
Smith, Iowa
Solarz
Spellman
Staggers
Stark
Steed
Steelman
Steiger, Wis.
Stokes
Studds
Symms
Thompson
Thone
Thornton
Traxler
Tsongas
Udall
Van Deerlin
Vander Veen
Vanik
Vigorito
Walsh
Waxman
Weaver
Whalen
Wilson, C. H.
Wilson, Tex.
Wirth
Wolff
Wright
Yates
Yatron
Young, Tex.
Zablocki

NOT VOTING—40

Burton, John
Clay
Dent
Esch
Eshleman
Evins, Tenn.
Fountain
Hansen
Hawkins
Hébert
Helstoski
Henderson
Hightower
Hinshaw
Jones, Ala.
Jones, Tenn.
Karth
Landrum
Litton
O'Hara
O'Neill
Peyser
Rangel
Reuss
Rhodes
Riegle
Roe
Rostenkowski
Sisk
Stanton, James V.
Steiger, Ariz.
Stephens
Stratton
Stuckey
Sullivan
Symington
Wampler
Wiggins
Young, Ga.
Zeferetti

The Clerk announced the following pairs:
On this vote:

Mr. Hébert for, with Mr. O'Neill against.
Mr. Henderson for, with Mr. Dent against.
Mr. Fountain for, with Mr. Zeferetti against.

So the amendment to the amendment in the nature of a substitute was rejected.

The result of the vote was announced as above recorded.

Mr. FUQUA. Madam Chairman, I move to strike the last word.

(Mr. FUQUA asked and was given permission to revise and extend his remarks.)

Mr. FUQUA. Madam Chairman, as one of the cosponsors of the Government in the Sunshine Act, I want to say what great personal pride I feel in witnessing this debate today.

My home State of Florida orginated government in the sunshine more than a decade ago and the results have been spectacular. People feel more confidence in their decisionmakers and, consequently, have more confidence in the decisions that are finally reached.

We need this concept at the national level and we need it now. Watergate and other events of the last few years have shown dramatically the need for openness in government. For far too long important decisions affecting the lives of all Americans have been made behind closed doors. This is not the way to run a democracy.

When administrative and executive agency decisions are reached, the people have a right to know what alternatives were considered and rejected, what pressures were applied by different interest groups and the reasoning behind the decision. Then, and only then, can we truly expect people to believe in these decisions.

In many important ways, our lives are affected by bureaucratic edicts. The people must have confidence in these edicts and in the way they were developed. This cannot occur when no one knows the decision-making processes involved.

The bill we are debating today makes ample room for those few exceptions when privacy at a meeting is required. But closed door meetings must be the exception and never the general rule.

We have made great strides in opening up House and Senate committee meetings as well as opening up the Democratic caucuses. The standards we have applied to ourselves have worked well and should be applied throughout the Federal Government.

People all across this Nation have lost confidence in their Government. We can help restore that confidence by our actions today. The Senate acted in a very responsible manner when they unanimously passed sunshine legislation and now it is the turn of the House of Representatives to show the American people our commitment to openness in Government.

Faith of a people in their Government is the cornerstone of a democracy. Public policy determined after public discussion of the issues is one of the precepts upon which that faith is based and we are all accountable today for our actions in maintaining and enlarging openness in Government.

AMENDMENT OFFERED BY MR. LATTA TO THE AMENDMENT IN THE NATURE OF A SUBSTITUTE OFFERED BY MR. FLOWERS

Mr. LATTA. Madam Chairman, I offer an amendment to the amendment in the nature of a substitute.

The Clerk read as follows:

Amendment offered by Mr. Latta to the amendment in the nature of a substitute offered by Mr. Flowers: Page 18, line 18, after "given" strike the period and insert "; but it shall not include requests for information on or status reports relative to any matter or proceeding covered by this subchapter."

(Mr. LATTA asked and was given permission to revise and extend his remarks.

Mr. FLOWERS. Madam Chairman, will the gentleman yield?

Mr. LATTA. I yield to the gentleman from Alabama.

Mr. FLOWERS. Madam Chairman, the gentleman from Ohio has gone over the amendment with this Member. I think it would perhaps help out in the legislation.

I think that the problem might arise from someone's reading of the term in the first two subparagraphs of subsection 557(d)(1). It might be well to revise the definition of ex parte communication, to alleviate the situation.

Ms. ABZUG. Madam Chairman, will the gentleman yield?

Mr. LATTA. I am happy to yield to the gentlewoman.

Ms. ABZUG. Madam Chairman, I have some problem with this. The language used here is "request for information."

Now, I feel "information" is a very broad word. I thought the gentleman was addressing himself to perfunctory inquiries, such as for status reports concerning particular proceedings. The word he has used might raise a lot of trouble and beyond where the gentleman really wants to go. I just wondered if the gentleman recognizes that and if the gentleman did, I might be willing to take this language to conference and there confine it to the intent of the gentleman without allowing it to go all over the lot.

Mr. LATTA. Madam Chairman, may I respond to the gentlewoman. I think the word "information" is most important to this amendment because we might get some agency or department downtown very narrowly construing the words "status report" and putting their own interpretation on it. If a Member of Congress calls downtown and wants a status report on a particular matter, they might put a very narrow interpretation on it. I might add that I went over the need for this amendment when I discussed the rule on the bill. I am trying to keep a door open so that we can get information from a department or agency without prejudice.

Mr. FASCELL. Madam Chairman, will the gentleman yield?

Mr. LATTA. I yield to the gentleman from Florida.

Mr. FASCELL. Madam Chairman, I can appreciate the gentleman's concern about the narrowness of the phrase "status report"; but on the other hand, the question of the broadness or liberality of the word "information" on the other side, raises a question. I do not think the gentleman means this. This is the reason I ask this question. If an individual wants to contact a member of the Board who is making a decision, in the middle of a proceeding, to get information on that decision, that is not covered under this amendment? The gentleman does not contemplate making legitimate, under the law, the right of an individual to get to the decisionmaker in the middle of a proceeding?

Mr. LATTA. We are talking about ex parte communications.

Mr. FASCELL. If the gentleman will yield further, I might make a call to an agency even though I am not a party to the proceeding.

Let me ask this question. Under the gentleman's language, would it be legal for me to go to the judge and say, "Judge, I want you to vote my way on this decision."

Mr. LATTA. Absolutely not.

Mr. FASCELL. That is what I meant. Would it be legal for any other individual to call that judge?

Mr. LATTA. Absolutely not. I might say to the gentleman, people on this side and on that side working on the bill, drew this amendment with the understanding it would apply to everybody and not just be limited to Members of Congress.

Mr. FASCELL. Madam Chairman, if the gentleman will yield further, what the gentleman from Ohio has in mind is that routine inquiries going to agencies saying, "What is the situation? What is going on? How long is it going to take?"

This amendment makes it clear that kinds of inquiries would not be prevented and would not have to be put on the record, but any inquiry which would or could reasonably be considered as affecting or attempting to affect the decisionmakers' decision would be put on the record?

Mr. LATTA. That is correct.

Mr. FASCELL. Thus any ex parte communications which attempt to influence the decisionmaker would not be exempt under your language: is that the intent?

Mr. LATTA. That is what I intend.

Mr. HORTON. Madam Chairman, will the gentleman yield?

Mr. LATTA. I yield to the gentleman from New York.

Mr. HORTON. Madam Chairman, I have been over the language the gentleman from Ohio has submitted and we feel it would be helpful and we accept it.

The CHAIRMAN. The question is on the amendment offered by the gentleman from Ohio (Mr. LATTA) to the amendment in the nature of a substitute offered by the gentleman from Alabama (Mr. FLOWERS).

The amendment to the amendment in the nature of a substitute was agreed to.

AMENDMENT OFFERED BY MR. MC CLOSKEY TO THE AMENDMENT IN THE NATURE OF A SUBSTITUTE BY MR. FLOWERS

Mr. MCCLOSKEY. Madam Chairman, I offer an amendment to the amendment in the nature of a substitute.

The Clerk read as follows:

Amendment offered by Mr. McCloskey to the amendment in the nature of a substitute offered by Mr. Flowers: On page 4, strike line 10 and everything that follows through line 13 and insert in lieu thereof the following:

"(3) disclose matters specifically exempted from disclosure by statute (other than section 552 of this title) provided that such statute (A) requires that the matters be withheld from the public, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.

And on page 19, strike line 10 and everything that follows through line 12 and insert in lieu thereof the following:

"(3) specifically exempted from disclosure by statute (other than section 552b of this title) provided that such statute (A) requires that the matters be withheld from the public, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;".

Mr. MCCLOSKEY. Madam Chairman, this is important because it is the sole amendment in the bill which amends the Freedom of Information Act. I would like to outline the history of this amendment's inclusion in the bill.

We enacted the Freedom of Information Act Amendments in 1974 in order to require Government agencies to disclose information which the administration then in power was wrongfully withholding.

In the case of the FAA versus Robertson, the Supreme Court held that Congress had not intended to have the Freedom of Information

Act apply to some 200 statutes which either required or permitted a Government employee to keep information secret. When the Sunshine Act came before the Subcommittee on Government Operations, we amended it to require that only if a statute laid down specific criteria for the withholding of information, would an agency be permitted to do so.

When the bill went before the Judiciary Committee, the words "or permitted" were added, but I think without consideration of what this caused. Our bill was intended to reverse the Robertson case and broaden the Freedom of Information Act. When the Judiciary Committee added the words "or permitted," the new language, in effect, broadened the exemption to allow an administrator under a permissive secrecy statute to keep information secret, unless the statute laid out specific criteria.

What I have done, essentially, in this amendment is to merely divide the two situations. If a statute, such as the Census Act, requires the Census Administrator to keep all information secret, it will not be subject to disclosure. On the other hand, if the statute merely permits the FAA Administrator to exercise discretion as to whether or not information shall be made public, without specific criteria, as to how he shall exercise that discretion, it must be released unless the Freedom of Information Act provisions permit it to be withheld.

In my discussions with the majority side of the Judiciary Committee, I understand, they are willing to accept this amendment.

Ms. ABZUG. Madam Chairman, will the gentleman yield?

Mr. MCCLOSKEY. I yield to the gentlewoman from New York.

Ms. ABZUG. Madam Chairman, I have a great deal of difficulty with the gentleman's amendment for the reason that it was he who proposed the amendment which we have in the original bill. I do not know who or what changed his mind, and I will not suggest that I do, except that I want to reassure the gentleman—I have some idea—that the question of confidentiality of the census and patent statute is protected under our present language, so that the purpose of the gentleman's amendment, which is to make sure that the recipient is instructed under the Freedom of Information Act, is different.

The gentleman is now setting up a special criteria even where a statute requires withholding of information, which is just the opposite.

Is that not clear? The gentleman is now saying that we cannot receive the information unless there are particular criteria, is that correct? If not, then what is it?

Mr. MCCLOSKEY. I will explain what I am trying to do with this amendment.

The Census Administrator receives information for which there is a specific requirement in the statute that it be kept secret. We never intended, when a person is required to keep information secret, that suddenly there be a requirement to make it public under the Freedom of Information Act. So if a statute requires that all census information be kept secret, we do not intend that data released under the FOI Act. But when the statute makes the retention of information subject to an Administrator's discretion, we would require that it be subject to the provisions of the FOI Act unless there is specific criteria for its withholding. It strengthens the act by requiring that in discretionary cases, unless a statute is specific about what data can be withheld, it shall be made available to the public under the conditions of the Freedom of Information Act.

Mr. FASCELL. Madam Chairman, will the gentleman yield?

Mr. MCCLOSKEY. I yield to the gentleman from Florida.

Mr. FASCELL. I thank the gentleman for yielding.

The language in the bill before us now places the special criteria of both kinds of statutes, one where it is mandatory, and one where it is permitted. What the gentleman's amendment does now is simply require the special criteria on permissive statutes and not on the mandatory.

The CHAIRMAN. The time of the gentleman from California has expired.

(By unanimous consent, Mr. MCCLOSKEY was allowed to proceed for 2 additional minutes.)

Mr. MCCLOSKEY. If I could yield to the gentleman from Massachusetts, who is on the Committee on Ways and Means, I think this situation will be resolved.

After we adopted this amendment, HEW and the Department of Commerce came to us and said, "Wait a minute. If your amendment remains as is, you are making information available which is required by statute to be kept confidential, such as the personal information gathered under the HEW statute or the data collected under the census statute. In fact, there would be one law saying it must be secret and now another law saying it must be made public."

Mr. BURKE of Massachusetts. Madam Chairman, will the gentleman yield?

Mr. MCCLOSKEY. I yield to the gentleman from Massachusetts.

Mr. BURKE of Massachusetts. I thank the gentleman for yielding.

I understand the gentleman received a letter from the Under Secretary of HEW concerning the impact of this amendment on the confidentiality of information concerning private individuals under the social security program and other programs administered by the Department. Is that letter correct in stating that the amendment has no intention, in revising exemption 3, to invalidate certain statutory provisions administered by HEW designed to protect the privacy of personal information obtained by that Department?

Mr. MCCLOSKEY. That is true. In fact, I would like to insert that letter from HEW in today's Extensions of Remarks in order to explain this, as part of the legislative history.

This amendment would continue to protect the privacy of personal information collected under these executive branch programs administered by HEW.

Mr. BURKE of Massachusetts. I understand that can be put in the Record.

Mr. MCCLOSKEY. I will put it in the Record.

Mr. BURKE of Massachusetts. If the gentleman will yield further, may I have the assurance of the gentleman that he will insert that letter when we go back into the House?

Mr. MCCLOSKEY. Yes; I will insert it in the Record today. (The letter appears on page E4148 of the Record of July 28.)[1]

The CHAIRMAN. The time of the gentleman has again expired.

(On request of Mr. KINDNESS, and by unanimous consent, Mr. MCCLOSKEY was allowed to proceed for 2 additional minutes.)

Mr. KINDNESS. Madam Chairman, will the gentleman yield?

---

[1] See p. 723, infra.

Mr. McCloskey. I yield to the gentleman from Ohio.

Mr. Kindness. I thank the gentleman for yielding.

Is the effect of this amendment intended to be directed specifically to the language in section 552 of this title, which reads that the meeting can be closed if the subject matter would disclose matters specifically exempted from disclosure by statute other than this section.

Mr. McCloskey. Yes. The reason is that we have deliberately made many of the Freedom of Information Act exemptions identical to the Sunshine Act exemptions. But we wanted to make sure that when we excluded matters in the Sunshine Act we did not include them under the Freedom of Information Act. It required the cross referencing of these exemptions between the two statutes.

Mr. Kindness. If the gentleman will yield further, could this possibly have the effect of being interpreted as meaning that we cannot close a meeting if it covers subject matter that is covered by one of section 552 exemptions in the Sunshine bill?

At least I read it as possibly being interpreted that way, so it is a conundrum and we might be going around in circles.

Mr. McCloskey. That is a complicated question. I honestly do not know the answer.

Mr. Kindness. I certainly have great misgivings on account of that possible interpretation.

Mr. McCloskey. A meeting cannot be closed except by the criteria that are specified in the Sunshine Act, and information cannot be made available under the Freedom of Information Act except as specified under the criteria of those acts.

Mr. Flowers. Madam Chairman, will the gentleman yield?

Mr. McCloskey. I yield to the gentleman from Alabama.

Mr. Flowers. Madam Chairman, I think that we all agree with the intent of the gentleman , but I will say to the gentleman from California (Mr. McCloskey) that I think what we have in his amendment, though, is just a repetition of the same thing in more words. If it is permitted, it is obviously going to conform with the statute that sets up criteria. The permission flows from the criteria in the statute.

Mr. McCloskey. But, Madam Chairman, what the gentleman does not recall is that if we have a statute that requires the Census Administrator to keep matters secret and it just says generally. "All information received," that does not set specific criteria as to what must be kept secret. This is the problem.

We do not want to exclude the statute that applies to HEW or the Census Administration. Yet, by the present language in the Sunshine Act we did. It is understandable why this was not picked up in the Committee on the Judiciary, because the members of the committee were really examining only the basic issues of the Sunshine Act, not the Freedom of Information Act.

The Chairman. The time of the gentleman from California (Mr. McCloskey) has expired.

(On request of Ms. Abzug and by unanimous consent, Mr. McCloskey was allowed to proceed for 2 additional minutes.)

Ms. Abzug. Madam Chairman, will the gentleman yield?

Mr. McCloskey. I yield to the gentlewoman from New York.

Ms. Abzug. Madam Chairman, there is a certain amount of confusion in this matter. For example, the gentleman correctly stated that we would like to make this language consistent with the language in sec-

tion 552 of the whole title. However, there are both similarities and differences in the existing law and in the legislation we are now dealing with. I am now speaking of the parenthetical language the gentleman would have added. That, if added, would place an additional burden on this act, and I believe it would create a lack of clarity.

I think I understand the gentleman's intention. Therefore, what I would like to suggest, if I may, particularly after having heard the statement of my colleague, the gentleman from Alabama (Mr. FLOWERS) is that we sit down and try to work out language that can be accepted in conference.

This amendment can be interpreted in four different ways, and it has been interpreted in different ways on the floor. It now has a different interpretation than it had when the gentleman first offered it. I would like to have an opportunity for us to deal with it, but I do not believe we can do it on the floor. We cannot redraft the amendment at this time.

Mr. MCCLOSKEY. Madam Chairman, I do not think we need to redraft the amendment, but I do think that we need to understand what it means.

It seems clear to me. The language says that if the statute requires that information be secret or the meeting be closed, no one is going to do otherwise. But if the statute permits a meeting to be open or closed or if it permits information to be released or not released, then the administrator of an agency becomes confused. If the statute is only permissive and does not set down specific criteria, then provisions of both the Sunshine Act and the Freedom of Information Act will apply. This amendment strengthens both acts.

Ms. ABZUG. Madam Chairman, there are some differences in the title now, and there are some similarities, as there are in the amendment, I will grant that. There are similarities and differences in this act.

Madam Chairman, I would suggest to the gentleman that he withdraw the amendment so that we can deal with it later more aptly.

Mr. MCCLOSKEY. Madam Chairman, if we withdraw the amendment, the Robertson case will not be overruled. That is the point. When we adopted my amendment in committee, its purpose was to overrule the Robertson case.

Ms. ABZUG. I think the language we have now overrules the Robertson case. This just presents a new qualification.

Mr. FASCELL. Madam Chairman, I move to strike the requisite number of words.

Madam Chairman, I would like to get this matter straight in my mind, so I wish the gentleman from California (Mr. MCCLOSKEY) would stay right where he is so he can answer my inquiry, because I am having a little problem also.

The original language in the bill of the Committee on Government Operations read that section 552(b)(3) of title V was amended to read: Subsection (3) "required to be withheld from the public by any statute establishing particular criteria or referring to particular types of information," and the gentleman has offered that as an amendment to the Freedom of Information Act to undo the Robertson case decision?

Mr. McCloskey. Madam Chairman, if the gentleman will yield, that is correct.

Mr. Fascell. Then the Committee on the Judiciary came along and added the words, "or permitted," to take care of those cases where we have a permissive statute having authority residing in the Secretary but not mandated by the Congress?

Mr. McCloskey. That is correct.

Mr. Fascell. Therefore, that covered both questions; that is to say, both types, where the Freedom of Information Act would not require information to be made public where it was required or permitted to be withheld; is that correct?

Mr. McCloskey. That is correct.

Mr. Fascell. Either by law or by referring to particular types of information; is that correct?

Mr. McCloskey. That is correct.

Mr. Fascell. I gather that what the gentleman is saying is that the qualifying clauses, to wit, establishing particular criteria or referring to particular types of information so qualify the exemption under the Freedom of Information Act or mandatory statute to the extent that the gentleman or somebody feels that even though we have a statute which authorizes an agency to withhold information, the language would be such that it would be required to release the information. That is the way I understand the gentleman's argument.

Therefore, he changes this around through the present amendment so that the qualifying amendment only applies to permissive statutes, those statutes which provide permission for the administrator; is that correct? It would be required that there be particular criteria or particular types of information, but that it would not apply to mandatory statutes; is that correct?

Mr. McCloskey. That is correct.

What I have not made clear, perhaps, is this: This is my amendment adopted in the committee unanimously, but before the committee heard from HEW or from the Census Bureau.

In other words, we went too far in requiring all mandatory statutes of secrecy to be made subject to the Freedom of Information Act. We are pulling back from that requirement that all information required now to be secret by one law is to be made available under this new law. We are pulling back from the first part of the section.

The second section is the one in which the Committee on the Judiciary added the words "or permitted." They brought into the law the very decision we wanted to override in the *Robertson* case.

What we have done is to prohibit the requirement that when information is required to be made secret, we do not need to apply the Freedom of Information Act or the Sunshine Act to those laws.

Mr. Fascell. How are we going to be governed under the present language? I do not see how, under the gentleman's amendment, except in the particulars which I have stated.

In other words, the way the amendment reads now, whenever there is a statute which mandates that information can be withheld, that is it, period. When it is withheld, there is no change in that under the bill or under the amendment.

Mr. McCloskey. No, no. Under the bill as it stands, without my amendment now, the statute that requires information to be held

secret has to have particular criteria in it or it becomes subject to being made public.

Mr. FASCELL. The gentleman is saying that what happens is that the basic law is being changed by the qualifying language; is that correct?

Mr. MCCLOSKEY. That is correct.

Mr. FASCELL. The gentleman is saying that all laws that were passed, that have previously been passed, which required information to be withheld, would be subject to the requirement here so that if they did not say particular classes of information or particular criteria, that would modify the basic law and would make all the information available?

Mr. MCCLOSKEY. Yes; in this country there are about 200 of these laws that the Supreme Court referred to, and unless the Court ordered it to be made secret and set particular criteria for it to be made secret, then by this amendment we are, in effect, directing the Director of the Census to make the information available, even though there is a specific law, because right in the statute there is a requirement for specific criteria.

Mr. FASCELL. If we take the gentleman's amendment at face value, I would hope it says what he says it does.

The CHAIRMAN. The question is on the amendment offered by the gentleman from California (Mr. MCCLOSKEY) to the amendment in the nature of a substitute offered by the gentleman from Alabama (Mr. FLOWERS).

The question was taken; and the Chairman, being in doubt, the Committee divided, and there were—ayes 34, noes 35.

RECORDED VOTE

Mr. MCCLOSKEY. Madam Chairman, I demand a recorded vote.

A recorded vote was ordered.

The vote was taken by electronic device, and there were—ayes 282, noes 112, not voting, 38, as follows:

[Roll No. 564]

AYES—282

Abdnor
Adams
Alexander
Allen
Anderson, Ill.
Andrews, N.C.
Andrews, N. Dak.
Annunzio
Archer
Armstrong
Ashbrook
Ashley
Aspin
AuCoin
Bafalis
Baldus
Beard, R.I.
Beard, Tenn.
Bedell
Bell
Bennett
Bergland
Bevill
Biester
Blanchard
Boggs
Boland
Bonker
Bowen
Brademas
Breaux
Brinkley
Broomfield
Brown, Mich.
Broyhill
Buchanan
Burgener
Burke, Fla.
Burke, Mass.
Burleson, Tex.
Burlison, Mo.
Byron
Carter
Cederberg
Chappell
Clancy
Clausen, Don H.
Clawson, Del
Cleveland
Cochran
Cohen
Collins, Tex.
Conable
Conland
Conte
Cornell
Cotter
Coughlin
Crane
D'Amours
Daniel, Dan
Daniel, R. W.
Daniels, N.J.
Davis
de la Garza
Delaney

Derrick
Derwinski
Devine
Dickinson
Dingell
Dodd
Downey, N.Y.
Downing, Va.
Duncan, Oreg.
Duncan, Tenn.
du Pont
Early
Edgar
Edwards, Ala.
Emery
English
Erlenborn
Eshleman
Evans, Colo.
Evans, Ind.
Fary
Fenwick
Findley
Fish
Fisher
Fithian
Flood
Florio
Flowers
Flynt
Foley
Ford, Tenn.
Forsythe
Frenzel
Frey
Gaydos
Giaimo
Gilman
Ginn
Goldwater
Gonzalez
Gradison
Grassley
Green
Gude
Guyer
Haley
Hall, Ill.
Hall, Tex.
Hamilton
Hammerschmidt
Hanley
Harris
Harsha
Hayes, Ind.
Hefner
Heinz
Henderson
Hillis
Holland
Holt
Horton
Howe
Hubbard
Hughes
Hungate
Hyde
Ichord
Jacobs
Jarman
Jeffords
Jenrette
Johnson, Colo.
Johnson, Pa.
Jones, N.C.
Jones, Okla.
Kasten
Kazen
Kelly
Kemp
Ketchum
Krebs
Krueger
LaFalce
Lagomarsino
Latta
Leggett
Lent
Levitas
Lloyd, Calif.
Lloyd, Tenn.
Long, Md.
Lott
Lujan
McClory
McCloskey
McCollister
McCormack
McDade
McDonald
McEwen
McFall
McKay
McKinney
Madden
Madigan
Mahon
Mann
Mathis
Mazzoli
Meeds
Melcher
Michel
Mikva
Milford
Mills
Mineta
Minish
Mitchell, N.Y.
Moakley
Moffett
Mollohan
Montgomery
Moore
Moorhead, Calif.
Morgan
Mosher
Murphy, Ill.
Murphy, N.Y.
Murtha
Myers, Ind.
Myers, Pa.
Natcher
Neal
Nedzi
Nichols
Obey
O'Brien
Pattison, N.Y.
Pepper
Perkins
Pettis
Pickle
Pressler
Price
Pritchard
Quie
Railsback
Randall
Rees
Regula
Risenhoover
Roberts
Robinson
Rodino
Rogers
Rooney
Roush
Rousselot
Runnels
Ruppe
Russo
Santini
Sarasin
Satterfield
Schneebeli
Schulze
Sebelius
Seiberling
Shipley
Shriver
Shuster
Simon
Skubitz
Slack
Smith, Iowa
Smith, Nebr.
Snyder
Spellman
Spence
Staggers
Stanton, J. William
Steiger, Wis.
Stephens
Symms
Talcott
Taylor, Mo.
Taylor, N.C.
Teague
Thone
Thornton
Traxler
Treen
Ullman
Van Deerlin
Vander Jagt
Vander Veen
Vanik
Waggonner
Walsh
Whalen
White
Whitehurst
Whitten
Wilson, Bob
Winn

Wirth
Wolff
Wright
Wydler
Wylie
Yates
Yatron
Young, Alaska
Young, Fla.
Zablocki

NOES—112

Abzug
Addabbo
Ambro
Anderson, Calif.
Badillo
Baucus
Bauman
Biaggi
Bingham
Blouin
Bolling
Breckinridge
Brodhead
Brooks
Brown, Calif.
Brown, Ohio
Burke, Calif.
Burton, Phillip
Butler
Carney
Carr
Chisholm
Collins, Ill.
Conyers
Corman
Danielson
Dellums
Diggs
Drinan
Eckhardt
Edwards, Calif.
Eilberg
Fascell
Ford, Mich.
Fraser
Fuqua
Gibbons
Goodling
Hagedorn
Hannaford
Harkin
Harrington
Hawkins
Hays, Ohio
Hechler, W. Va.
Heckler, Mass.
Hicks
Holtzman
Howard
Hutchinson
Johnson, Calif.
Jordan
Kastenmeier
Keys
Kindness
Koch
Lehman
Long, La.
Lundine
McHugh
Maguire
Matsunaga
Metcalfe
Meyner
Mezvinsky
Miller, Calif.
Miller, Ohio
Mink
Mitchell, Md.
Moorhead, Pa.
Moss
Mottl
Nix
Nolan
Nowak
Oberstar
Ottinger
Passman
Patten, N. J.
Patterson, Calif.
Paul
Pike
Poage
Preyer
Quillen
Rangel
Richmond
Rinaldo
Roncalio
Rose
Rosenthal
Roybal
Ryan
St Germain
Sarbanes
Scheuer
Schroeder
Sharp
Solarz
Stark
Steed
Stokes
Studds
Thompson
Tsongas
Udall
Vigorito
Waxman
Weaver
Wilson, C. H.
Wilson, Tex.
Young, Tex.

NOT VOTING—38

Burton, John
Clay
Dent
Esch
Evins, Tenn.
Fountain
Hansen
Hébert
Helstoski
Hightower
Hinshaw
Jones, Ala.
Jones, Tenn.
Karth
Landrum
Litton
Martin
O'Hara
O'Neill
Peyser
Reuss
Rhodes
Riegle
Roe
Rostenkowski
Sikes
Sisk
Stanton, James V.
Steelman
Steiger, Ariz.
Stratton
Stuckey
Sullivan
Symington
Wampler
Wiggins
Young, Ga.
Zeferetti

The Clerk announced the following pairs:
On this vote:

Mr. Hébert for, with Mr. John Burton against.
Mr. Landrum for, with Mr. Riegle against.
Mr. O'Neill for, with Mr. Clay against.

Mr. Symms changed his vote from "no" to "aye."

Mr. Biaggi and Mr. Rinaldo changed their vote from "aye" to "no."

So the amendment to the amendment in the nature of a substitute was agreed to.

The result of the vote was announced as above recorded.

AMENDMENT OFFERED BY MR. KINDNESS TO THE AMENDMENT IN THE NATURE OF A SUBSTITUTE OFFERED BY MR. FLOWERS

Mr. KINDNESS. Madam Chairman, I offer an amendment to the amendment in the nature of a substitute,

The Clerk read as follows:

Amendment offered by Mr. Kindness to the amendment in the nature of a substitute offered by Mr. Flowers: On page 2, strike lines 14–21 and insert the following in lieu thereof: "(1) the term 'agency' means:

Board for International Broadcasting;
Civil Aeronautics Board;
Commodity Futures Trading Commission;
Consumer Product Safety Commission;
Equal Employment Opportunity Commission;
Export-Import Bank of the United States (Board of Directors);
Federal Communications Commission;
Federal Election Commission;
Federal Deposit Insurance Corporation (Board of Directors);
Federal Farm Credit Board within the Farm Credit Administration;
Federal Home Loan Bank Board;
Federal Maritime Commission;
Federal Power Commission;
Federal Trade Commission;
Harry S. Truman Scholarship Foundation (Board of Trustees);
Indian Claims Commission;
Inter-American Foundation (Board of Directors);
Interstate Commerce Commission;
Legal Services Corporation (Board of Directors;)
Mississippi River Commission;
National Commission on Libraries and Information Science;
National Council on Educational Research;
National Council on Quality in Education;
National Credit Union Board;
National Homeownership Foundation (Board of Directors);
National Labor Relations Board;
National Library of Medicine (Board of Regents);
National Mediation Board;
National Science Board of the National Science Foundation;
National Transportation Safety Board;
Nuclear Regulatory Commission;
Occupational Safety and Health Review Commission;
Overseas Private Investment Corporation (Board of Directors);
Railroad Retirement Board;
Renegotiation Board;
Tennessee Valley Authority (Board of Directors);
Uniformed Services University of the Health Sciences (Board of Regents);
U.S. Civil Service Commission;
U.S. Commission on Civil Rights.
U.S. Foreign Claims Settlement Commission;
U.S. International Trade Commission;
U.S. Postal Service (Board of Governors); and
U.S. Railway Association;

Mr. KINDNESS (during the reading). Madam Chairman, I ask unanimous consent that the amendment to the amendment in the nature of a substitute be considered as read and printed in the Record.

The CHAIRMAN. Is there objection to the request of the gentleman from Ohio?

There was no objection.

(Mr. KINDNESS asked and was given permission to revise and extend his remarks.)

Mr. KINDNESS. Madam Chairman, I think this process that has been worked on this bill has been a very good example of improving some legislation so that it really reaches the point of being, I think, the best product that we can accomplish in the area, with the exception of the definition of "agency."

On page 2 of the bill, the current language defines an agency in terms of those bodies called "collegial" bodies, including members appointed by the President, with the advice and consent of the Senate; but we do not really know what that includes totally.

Over in the Senate, the report of the committee included a listing of the Boards and Commissions that would be within the scope of coverage of the bill as it was dealt with in that body.

It is the long list of some 40-some different commissions and boards. I suggest that this is an occasion when we are taking an important step, but we ought to know exactly what we are doing when we do it. This amendment which I have submitted includes the listing that was in the committee report of the other body, with certain exceptions which I will enumerate.

One of the exceptions is the elimination of the Commodity Credit Corporation from the list. The reason for the Commodity Credit Corporation being eliminated is that, in fact, in statutory language, it is quite clear that it is not really a collegial body in the same sense as most of these others. As originally enacted in 1948, section 2 of 15 United States Code, section 714, the Charter Act of the Commodity Credit Corporation provided that the corporation was subject to the general direction and control of its board of directors. Then it went on, and in 1949, by amendment, that was changed so that the Commodity Credit Corporation functioning is subject now to the general supervision and direction of the Secretary of Agriculture.

Section 9 of the act of 1949 provides that the management of the corporation shall be vested in the board of directors, subject to general supervision and direction of the Secretary. I think it is quite clear that there is a case in which we did not intend to include that type of body; at least I would imagine that is the intention. But nonetheless it was in the listing in the Senate.

Also eliminated from the listing in the other body's committee report is the Federal Reserve Board. Because of some of the points that have been brought out here in debate and discussion today, there is so much involved in the functioning of that Board that by its very nature ought not to be disclosed, it would appear that almost a majority of the meeting of the Federal Reserve Board would be in the category where they have to be closed.

I suspect that we ought to see how this law functions before we start applying it in sensitive areas of that nature. The same is true with the Securities and Exchange Commission, and the same is true with the Parole Board. The Parole Board was on the list in the other body and is not included in the list in this amendment.

I think we really should know exactly what we are doing when we apply this bill, which will become an act, and I am confident that it will. I am sure it has the broadest kind of support, and I suspect that

we easily can and will include other bodies if this amendment is adopted. We will include other bodies in the coverage of it as we gain some experience with it.

I suspect that we should do that, and it should be the subject of oversight for the purpose of achieving that goal. We want government in the sunshine just as broadly as we can have it, but I do believe that we are venturing into the area of interminable litigation with the present language of the bill. It invites litigation; it invites uncertainty, and there is nothing better that we can do with the definition of agency than to make it certain and avoid that litigation that, in other references here in the Committee of the Whole today we have heard, would add to the burden of the courts which are already clogged.

Madam Chairman, I would urge support of the amendment.

Ms. ABZUG. Madam Chairman, I move to strike the last word.

(Ms. ABZUG asked and was given permission to revise and extend her remarks.)

Ms. ABZUG. Madam Chairman, I rise in opposition to the amendment. Again, I want to point out to this body that all four House committees and subcommittees considered this bill, and we all rejected this particular amendment. I think we should follow suit here. The bill as we have reported it contains a simple and entirely clear definition of a public agency, namely any agency subject to the Freedom of Information Act and "headed by a collegial body composed of two or more individual members, a majority of whom are appointed to such positions by the President with the advice and consent of the Senate."

This is the same approach that the Congress has used in the Administrative Procedure Act, which has been in existence since 1946, the Freedom of Information Act, and the Privacy Act of 1974. It has been the subject of relatively little litigation, and it has the advantage of not having to be amended each time an agency's name is changed or a new agency is established or an agency is disposed of.

It has been demonstrated to be eminently workable, and it should be retained.

I want to point out to the Members that this amendment exempts from the operation of this act the Federal Reserve Board, the Parole Board, the Securities and Exchange Commission, and the Commodity Credit Corporation. It seems to me that if we are going to have open government, government in the sunshine, there is no reason why we should leave these agencies in the darkness.

Mr. FLOWERS. Madam Chairman, will the gentlewoman yield?

Ms. ABZUG. I yield to the gentleman from Alabama.

Mr. FLOWERS. I thank the gentlewoman for yielding.

I want to express my complete approval of everything the gentlewoman has said. This bill has been amended to where it is a much more modest proposal than it was in the first instance, and I would think that even the Federal Reserve Board might want to be included under this bill. The general definition is absolutely to be preferred for all of the reasons that the gentlewoman recited, and I wholeheartedly agree with her position.

Mr. FASCELL. Madam Chairman, will the gentlewoman yield?

Ms. ABZUG. I yield to the gentleman from Florida.

Mr. FASCELL. I thank the gentlewoman for yielding.

I agree with the gentleman. The general provisions of the bill are workable. We ought to go along with the bill and turn down this amendment.

The CHAIRMAN. The question is on the amendment offered by the gentleman from Ohio (Mr. KINDNESS) to the amendment in the nature of a substitute offered by the gentleman from Alabama (Mr. FLOWERS).

The amendment to the amendment in the nature of a substitute was rejected.

The CHAIRMAN. If there are no further amendments, the question is on the amendment in the nature of a substitute offered by the gentleman from Alabama (Mr. FLOWERS), as amended.

The amendment in the nature of a substitute, as amended, was agreed to.

The CHAIRMAN. Under the rule, the Committee rises.

Accordingly the Committee rose; and the Speaker pro tempore (Mr. MCFALL), having assumed the chair, Mrs. BURKE of California, Chairman of the Committee of the Whole House on the State of the Union, reported that that Committee having had under consideration the bill (H.R. 11656) to provide that meetings of Government agencies shall be open to the public, and for other purposes, pursuant to House Resolution 1207, she reported the bill back to the House with an amendment adopted by the Committee of the Whole.

The SPEAKER pro tempore. Under the rule, the previous question is ordered.

The question is on the amendment.

The amendment was agreed to.

The SPEAKER pro tempore. The question is on the engrossment and third reading of the bill.

The bill was ordered to be engrossed and read a third time, and was read the third time.

The SPEAKER pro tempore. The question is on the passage of the bill.

Ms. ABZUG. Mr. Speaker, on that I demand the yeas and nays.

The yeas and nays were ordered.

The vote was taken by electronic device, and there were—yeas 390, nays 5, not voting 37, as follows:

[Roll No. 565]

YEAS—390

Abdnor	Baldus	Brademas
Abzug	Baucus	Breaux
Adams	Bauman	Breckinridge
Addabo	Beard, R.I.	Brinkley
Alexander	Beard, Tenn.	Brodhead
Allen	Bedell	Brooks
Ambro	Bell	Broomfield
Anderson, Calif.	Bennett	Brown, Calif.
Anderson, Ill.	Bergland	Brown, Mich.
Andrews, N.C.	Bevill	Brown, Ohio
Andrews, N.Dak.	Biaggi	Broyhill
Annunzio	Biester	Buchanan
Archer	Bingham	Burgener
Armstrong	Blanchard	Burke, Calif.
Ashbrook	Blouin	Burke, Fla
Ashley	Boggs	Burke, Mass.
Aspin	Boland	Burlison, Mo.
AuCoin	Bolling	Burton, Phillip
Badillo	Bonker	Butler
Bafalis	Bowen	Byron

Carney
Carr
Carter
Cederberg
Chappell
Chisholm
Clancy
Clausen, Don H.
Cleveland
Cochran
Cohen
Collins, Ill.
Conable
Conlan
Conte
Conyers
Corman
Cornell
Cotter
Coughlin
Crane
D'Amours
Daniel, Dan
Daniel, R. W.
Daniels, N.J.
Danielson
Davis
de la Garza
Delaney
Dellums
Derrick
Derwinski
Devine
Diggs
Dingell
Dodd
Downey, N.Y.
Downing, Va.
Drinan
Duncan, Oreg.
Duncan, Tenn.
du Pont
Early
Eckhardt
Edgar
Edwards, Ala.
Edwards, Calif.
Eilberg
Emery
English
Erlenborn
Eshleman
Evans, Colo.
Evans, Ind.
Evins, Tenn.
Fary
Fascell
Fenwick
Findley
Fish
Fisher
Fithian
Flood
Florio
Flowers
Flynt
Foley
Ford, Mich.
Ford, Tenn.
Forsythe
Fraser
Frenzel
Frey
Fuqua
Gaydos
Giaimo
Gibbons
Gilman
Ginn
Goldwater
Gonzalez
Goodling
Gradison
Grassley
Green
Gude
Guyer
Hagedorn
Haley
Hall, Ill.
Hall, Tex.
Hamilton
Hammerschmidt
Hanley
Hannaford
Harkin
Harrington
Harris
Harsha
Hawkins
Hayes, Ind.
Hays, Ohio
Hechler, W. Va.
Heckler, Mass.
Hefner
Heinz
Henderson
Hicks
Hills
Holland
Holt
Holtzman
Horton
Howard
Howe
Hubbard
Hughes
Hungate
Hutchinson
Hyde
Jacobs
Jarman
Jeffords
Jenrette
Johnson, Calif.
Johnson, Colo.
Johnson, Pa.
Jones, N.C.
Jones, Okla.
Jordan
Kasten
Kastenmeier
Kazen
Kelly
Kemp
Ketchum
Keys
Kindness
Koch
Krebs
Krueger
LaFalce
Lagomarsino
Latta
Leggett
Lehman
Lent
Levitas
Lloyd, Calif.
Lloyd, Tenn.
Long, La.
Long, Md.
Lott
Lujan
Lundine
McClory
McCloskey
McCollister
McCormack
McDade
McDonald
McEwen
McFall
McHugh
McKay
McKinney
Madden
Madigan
Maguire
Mahon
Mann
Martin
Mathis
Matsunaga
Mazzoli
Meeds
Metcalfe
Meyner
Mezvinsky
Michel
Mikva
Milford
Miller, Calif.
Miller, Ohio
Mills
Mineta
Minish
Mink
Mitchell, Md.
Mitchell, N.Y.
Moakley
Moffett
Mollohan
Montgomery
Moore
Moorhead, Calif.
Moorhead, Pa.
Morgan
Mosher
Moss
Mottl
Murphy, Ill.
Murphy, N.Y.
Murtha
Myers, Ind.
Myers, Pa.
Natcher

Neal
Nedzi
Nichols
Nix
Nolan
Nowak
Oberstar
Obey
O'Brien
Ottinger
Passman
Patterson, Calif.
Patten, N.J.
Pattison, N.Y.
Paul
Pepper
Perkins
Pettis
Pickle
Pike
Pressler
Preyer
Price
Pritchard
Quie
Quillen
Railsback
Randall
Rangel
Rees
Regula
Richmond
Rinaldo
Risenhoover
Roberts
Robinson
Rodino
Roe
Rogers
Roncalio
Rooney
Rose
Rosenthal
Roush
Rousselot
Roybal
Runnels
Ruppe
Russo
Ryan
St Germain
Santini
Sarasin
Sarbanes
Satterfield
Scheuer
Schneebeli
Schroeder
Schulze
Sebelius
Seiberling
Sharp
Shipley
Shriver
Shuster
Simon
Skubitz
Slack
Smith, Iowa
Smith, Nebr.
Snyder
Solarz
Spellman
Spence
Staggers
Stanton, J. Willam
Stark
Steed
Steiger, Wis.
Stephens
Stokes
Studds
Symms
Talcott
Taylor, Mo.
Taylor, N.C.
Thompson
Thone
Thornton
Traxler
Treen
Tsongas
Udall
Ullman
Van Deerlin
Vander Jagt
Vander Veen
Vanik
Vigorito
Waggonner
Walsh
Waxman
Weaver
Whalen
White
Whitehurst
Whitten
Wilson, Bob
Wilson, C. H.
Wilson, Tex.
Winn
Wirth
Wolff
Wright
Wydler
Wylie
Yates
Yatron
Young, Alaska
Young, Fla.
Young, Tex.
Zablocki

NAYS—5

Burleson, Tex.
Collins, Tex.
Dickinson
Poage
Teague

NOT VOTING—37

Burton, John
Clay
Dent
Esch
Fountain
Hansen
Hébert
Helstoski
Hightower
Hinshaw
Ichord
Jones, Ala.
Jones, Tenn.
Karth
Landrum
Litton
Melcher
O'Hara
O'Neill
Peyser
Reuss
Rhodes
Riegle
Rostenkowski
Sikes
Sisk
Stanton, James V.
Steelman
Steiger, Ariz.
Stratton
Stuckey
Sullivan
Symington
Wampler
Wiggins
Young,Ga.
Zeferetti

The Clerk announced the following pairs:

Mr. O'Neill with Mr. Sikes.
Mr. Dent with Mr. Stuckey.
Mr. Zeferetti with Mr. Clay.
Mr. Rostenkowski with Mr. Karth.

Mr. Helstoski with Mr. O'Hara.
Mr. Fountain with Mr. Steiger of Arizona.
Mr. Jones of Tennessee with Mr. Stratton.
Mr. John L. Burton with Mrs. Sullivan.
Mr. Landrum with Mr. Wiggins.
Mr. Melcher with Mr. Wampler.
Mr. Riegle with Mr. Young of Georgia.
Mr. Symington with Mr. Peyser.
Mr. Sisk with Mr. Esch.
Mr. Hébert with Mr. Hansen.
Mr. Ichord with Mr. Hightower.
Mr. Jones of Alabama with Mr. James V. Stanton.
Mr. Reuss with Mr. Steelman.

So the bill was passed.

The result of the vote was announced as above recorded.

A motion to reconsider was laid on the table.

The SPEAKER pro tempore. Pursuant to the provisions of House Resolution 1207, the Committee on Government Operations is discharged from the further consideration of the Senate bill (S. 5) to provide that meetings of Government agencies shall be open to the public, and for other purposes.

The Clerk read the title of the Senate bill.

MOTION OFFERED BY MR. BROOKS

Mr. BROOKS. Mr. Speaker, I offer a motion.

The Clerk read as follows:

Mr. Brooks moves to strike out all after the enacting clause of the Senate bill S. 5* and to insert in lieu thereof the provisions of H.R. 11656, as passed, as follows:

---

*A copy of S. 5, as passed the Senate on November 6, 1975 and referred to the House on November 10, 1975 may be found on p. 357.

In the House of Representatives, U. S.,

July 28, 1976.

Resolved, That the bill from the Senate (S. 5) entitled "An Act to provide that meetings of Government agencies shall be open to the public, and for other purposes", do pass with the following

AMENDMENT:

Strike out all after the enacting clause, and insert: *That this Act may be cited as the "Government in the Sunshine Act".*

DECLARATION OF POLICY

SEC. 2. It is hereby declared to be the policy of the United States that the public is entitled to the fullest practicable information regarding the decisionmaking processes of the Federal Government. It is the purpose of this Act to provide the public with such information while protecting the rights of individuals and the ability of the Government to carry out its responsibilities.

OPEN MEETINGS

SEC. 3. (a) Title 5, United States Code, is amended by adding after section 552a the following new section:

80-459 O - 77 - 46

"§ 552b. **Open meetings**

"(a) For purposes of this section—

"(1) the term 'agency' means the Federal Election Commission and any agency, as defined in section 552 (e) of this title, headed by a collegial body composed of two or more individual members, a majority of whom are appointed to such position by the President with the advice and consent of the Senate, and includes any subdivision thereof authorized to act on behalf of the agency;

"(2) the term 'meeting' means a gathering to jointly conduct or dispose of agency business by two or more, but at least the number of individual agency members required to take action on behalf of the agency, but does not include gatherings required or permitted by subsection (d); and

"(3) the term 'member' means an individual who belongs to a collegial body heading an agency.

"(b)(1) Members as described in subsection (a)(2) shall not jointly conduct or dispose of agency business without complying with subsections (b) through (g).

"(2) Except as provided in subsection (c), every portion of every meeting of an agency shall be open to public observation.

"(c) Except in a case where the agency finds that the public interest requires otherwise, subsection (b) shall not

apply to any portion of an agency meeting and the requirements of subsections (d) and (e) shall not apply to any information pertaining to such meeting otherwise required by this section to be disclosed to the public, where the agency properly determines that such portion or portions of its meeting or the disclosure of such information is likely to—

"(1) disclose matters (A) specifically authorized under criteria established by an Executive order to be kept secret in the interests of national defense or foreign policy and (B) in fact properly classified pursuant to such Executive order;

"(2) relate solely to the internal personnel rules and practices of an agency;

"(3) disclose matters specifically exempted from disclosure by statute (other than section 552 of this title): Provided, That such statute (A) requires that the matters be withheld from the public, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

"(4) disclose trade secrets and commercial or financial information obtained from a person and privileged or confidential;

"(5) involve accusing any person of a crime, or formally censuring any person;

"(6) disclose information of a personal nature

where disclosure would constitute a clearly unwarranted invasion of personal privacy;

"(7) disclose investigatory records compiled for law enforcement purposes, or information which if written would be contained in such records, but only to the extent that the production of such records or information would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;

"(8) disclose information contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions;

"(9) disclose information the premature disclosure of which would—

"(A) in the case of an agency which regulates

currencies, securities, commodities, or financial institutions, be likely to (i) lead to significant financial speculation, or (ii) significantly endanger the stability of any financial institution; or

"(B) in the case of any agency, be likely to significantly frustrate implementation of a proposed agency action, except that this subparagraph shall not apply in any instance after the content or nature of the proposed agency action has been disclosed to the public by the agency, unless the agency is required by law to make such disclosure prior to taking final agency action on such proposal, or after the agency publishes or serves a substantive rule pursuant to section 553(d) of this title; or

"(10) specifically concern the agency's issuance of a subpena, or the agency's participation in a civil action or proceeding, an action in a foreign court or international tribunal, or an arbitration, or the initiation, conduct, or disposition by the agency of a particular case of formal agency adjudication pursuant to the procedures in section 554 of this title or otherwise involving a determination on the record after opportunity for a hearing.

"(d)(1) Action under subsection (c) to close a portion or portions of an agency meeting shall be taken only

when a majority of the entire membership of the agency votes to take such action. A separate vote of the agency members shall be taken with respect to each agency meeting a portion or portions of which are proposed to be closed to the public pursuant to subsection (c). A single vote may be taken with respect to a series of portions of meetings which are proposed to be closed to the public, or with respect to any information concerning such series, so long as each portion of a meeting in such series involves the same particular matters, and is scheduled to be held no more than thirty days after the initial portion of a meeting in such series. The vote of each agency member participating in such vote shall be recorded and no proxies shall be allowed.

"(2) Whenever any person whose interests may be directly affected by a portion of a meeting requests that the agency close such portion to the public for any of the reasons referred to in paragraph (5), (6), or (7) of subsection (c), the agency, upon request of any one of its members, shall vote by recorded vote whether to close such meeting.

"(3) Within one day of any vote taken pursuant to paragraph (1) or (2), the agency shall make publicly available a written copy of such vote reflecting the vote of each member on the question. If a portion of a meeting is to be closed to the public, the agency shall, within one day of the vote taken pursuant to paragraph (1) or (2) of this

subsection, make publicly available a full written explanation of its action closing the portion together with a list of all persons expected to attend the meeting and their affiliation.

"(4) Any agency, a majority of whose meetings may properly be closed to the public pursuant to paragraph (4), (8), (9)(A), or (10) of subsection (c), or any combination thereof, may provide by regulation for the closing of such meetings or portions thereof in the event that a majority of the members of the agency votes by recorded vote at the beginning of such meeting, or portion thereof, to close the exempt portion or portions of the meeting, and a copy of such vote, reflecting the vote of each member on the question, is made available to the public. The provisions of paragraphs (1), (2), and (3) of this subsection and subsection (e) shall not apply to any portion of a meeting to which such regulations apply: Provided, That the agency shall, except to the extent that such information is exempt from disclosure under the provisions of subsection (c), provide the public with public announcement of the date, place, and subject matter of the meeting and each portion thereof at the earliest practicable time and in no case later than the commencement of the meeting or portion in question.

"(e) In the case of each meeting, the agency shall make public announcement, at least one week before the meeting, of the date, place, and subject matter of the meeting, whether

it is to be open or closed to the public, and the name and phone number of the official designated by the agency to respond to requests for information about the meeting. Such announcement shall be made unless a majority of the members of the agency determines by a recorded vote that agency business requires that such meeting be called at an earlier date, in which case the agency shall make public announcement of the date, place, and subject matter of such meeting, and whether open or closed to the public, at the earliest practicable time and in no case later than the commencement of the meeting or portion in question. The time, place, or subject matter of a meeting, or the determination of the agency to open or close a meeting, or portion of a meeting, to the public, may be changed following the public announcement required by this paragraph only if (1) a majority of the entire membership of the agency determines by a recorded vote that agency business so requires and that no earlier announcement of the change was possible, and (2) the agency publicly announces such change and the vote of each member upon such change at the earliest practicable time and in no case later than the commencement of the meeting or portion in question.

"(f)(1) For every meeting closed pursuant to paragraphs (1) through (10) of subsection (c), the General Counsel or chief legal officer of the agency shall publicly

certify that, in his opinion, the meeting may be closed to the public and shall state the relevant exemptive provision. A copy of such certification, together with a statement from the presiding officer of the meeting setting forth the date, time, and place of the meeting, the persons present, the generic subject matter of the discussion at the meeting, and the actions taken, shall be incorporated into minutes retained by the agency.

"(2) Written minutes shall be made of any agency meeting, or portion thereof, which is open to the public. The agency shall make such minutes promptly available to the public in a location easily accessible to the public, and shall maintain such minutes for a period of at least two years after such meeting. Copies of such minutes shall be furnished to any person at no greater than the actual cost of duplication thereof or, if in the public interest, at no cost.

"(g) Each agency subject to the requirements of this section shall, within 180 days after the date of enactment of this section, following consultation with the Office of the Chairman of the Administrative Conference of the United States and published notice in the Federal Register of at least thirty days and opportunity for written comment by any persons, promulgate regulations to implement the requirements of subsections (b) through (f) of this section. Any person may bring a proceeding in the United States

District Court for the District of Columbia to require an agency to promulgate such regulations if such agency has not promulgated such regulations within the time period specified herein. Subject to any limitations of time therefor provided by law, any person may bring a proceeding in the United States Court of Appeals for the District of Columbia to set aside agency regulations issued pursuant to this subsection that are not in accord with the requirements of subsections (b) through (f) of this section, and to require the promulgation of regulations that are in accord with such subsections.

"(h) The district courts of the United States have jurisdiction to enforce the requirements of subsections (b) through (f) of this section. Such actions may be brought by any person against an agency prior to, or within sixty days after, the meeting out of which the violation of this section arises, except that if public announcement of such meeting is not initially provided by the agency in accordance with the requirements of this section, such action may be instituted pursuant to this section at any time prior to sixty days after any public announcement of such meeting. Such actions may be brought in the district court of the United States for the district in which the agency meeting is held, or in the District Court for the District of Columbia, or where the agency in question has its headquarters. In such actions a defendant

shall serve his answer within twenty days after the service of the complaint, but such time may be extended by the court for up to twenty additional days upon a showing of good cause therefor. The burden is on the defendant to sustain his action. In deciding such cases the court may examine in camera any portion of the minutes of a meeting closed to the public, and may take such additional evidence as it deems necessary. The court, having due regard for orderly administration and the public interest, as well as the interests of the party, may grant such equitable relief as it deems appropriate, including granting an injunction against future violations of this section, or ordering the agency to make available to the public such portion of the minutes of a meeting as is not authorized to be withheld under subsection (c) of this section. Nothing in this section confers jurisdiction on any district court acting solely under this subsection to set aside, enjoin or invalidate any agency action taken or discussed at an agency meeting out of which the violation of this section arose.

"(i) The court may assess against any party reasonable attorney fees and other litigation costs reasonably incurred by any other party who substantially prevails in any action brought in accordance with the provisions of subsection (g) or (h) of this section, except that costs may be assessed against the plantiff only where the court finds

that the suit was initiated by the plaintiff primarily for frivolous or dilatory purposes. In the case of assessment of costs against an agency, the costs may be assessed by the court against the United States.

"(j) Each agency subject to the requirements of this section shall annually report to Congress regarding its compliance with such requirements, including a tabulation of the total number of agency meetings open to the public, the total number of meetings closed to the public, the reasons for closing such meetings, and a description of any litigation brought against the agency under this section, including any costs assessed against the agency in such litigation (whether or not paid by the agency).

"(k) Except as specifically provided in this section, nothing herein expands or limits the present rights of any person under section 552 of this title, except that the provisions of this Act shall govern in the case of any request made pursuant to such section to copy or inspect the minutes described in subsection (f) of this section. The requirements of chapter 33 of title 44, United States Code, shall not apply to the minutes described in subsection (f) of this section.

"(l) This section does not constitute authority to withhold any information from Congress, and does not authorize the closing of any agency meeting or portion thereof otherwise required by law to be open.

"(m) Nothing in this section authorizes any agency to withhold from any individual any record, including minutes required by this Act, which is otherwise accessible to such individual under section 552a of this title.

"(n) In the event that any meeting is subject to the provisions of the Federal Advisory Committee Act as well as the provisions of this section, the provisions of this section shall govern.".

(b) The chapter analysis of chapter 5 of title 5, United States Code, is amended by inserting:

"552b. Open meetings."

immediately below:

"552a. Records about individuals.".

EX PARTE COMMUNICATIONS

SEC. 4. (a) Section 557 of title 5, United States Code, is amended by adding at the end thereof the following new subsection:

"(d)(1) In any agency proceeding which is subject to subsection (a) of this section, except to the extent required for the disposition of ex parte matters as authorized by law—

"(A) no interested person outside the agency shall make or cause to be made to any member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceed-

ing, an ex parte communication relative to the merits of the proceeding;

"(B) no member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, shall make or cause to be made to any interested person outside the agency an ex parte communication relative to the merits of the proceeding;

"(C) a member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of such proceeding who receives, or who makes or causes to be made, a communication prohibited by this subsection shall place on the public record of the proceeding:

"(i) all such written communications;

"(ii) memoranda stating the substance of all such oral communications; and

"(iii) all written responses, and memoranda stating the substance of all oral responses, to the materials described in clauses (i) and (ii) of this subparagraph;

"(D) in the event of a communication prohibited by this subsection and made or caused to be made by a

party or interested person, the agency, administrative law judge, or other employee presiding at the hearing may, to the extent consistent with the interests of justice and the policy of the underlying statutes, require the person or party to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation; and

"(E) the prohibitions of this subsection shall apply beginning at such time as the agency may designate, but in no case shall they begin to apply later than the time at which a proceeding is noticed for hearing unless the person responsible for the communication has knowledge that it will be noticed, in which case the prohibitions shall apply beginning at the time of his acquisition of such knowledge.

"(2) This section does not constitute authority to withhold information from Congress.".

(b) Section 551 of title 5, United States Code, is amended—

(1) by striking out "and" at the end of paragraph (12);

(2) by striking out the "act." at the end of paragraph (13) and inserting in lieu thereof "act; and"; and

(3) by adding at the end thereof the following new paragraph:

"(14) 'ex parte communication' means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given; but it shall not include requests for information on or status reports relative to any matter or proceeding covered by this subchapter.".

(c) Section 556(d) of title 5, United States Code, is amended by inserting between the third and fourth sentences thereof the following new sentence: "The agency may, to the extent consistent with the interests of justice and the policy of the underlying statutes administered by the agency, consider a violation of section 557(d) of this title sufficient grounds for a decision adverse to a person or party who has committed such violation or caused such violation to occur.".

CONFORMING AMENDMENTS

SEC. 5. (a) Section 410(b)(1) of title 39, United States Code, is amended by inserting after "Section 552 (public information)," the words "section 552a (records about individuals), section 552b (open meetings),".

(b) Section 552(b)(3) of title 5, United States Code, is amended to read as follows:

"(3) specifically exempted from disclosure by statute (other than Section 552b of this title): Provided, That

such statute (A) requires that the matters be withheld from the public, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;".

(c) Subsection (d) of section 10 of the Federal Advisory Committee Act is amended by striking out the first sentence and inserting in lieu thereof the following: "Subsections (a)(1) and (a)(3) of this section shall not apply to any portion of an advisory committee meeting where the President, or the head of the agency to which the advisory committee reports, determines that such portion of such meeting may be closed to the public in accordance with subsection (c) of section 552b of title 5, United States Code.".

EFFECTIVE DATE

SEC. 6. (a) Except as provided in subsection (b) of this section, the provisions of this Act shall take effect one hundred and eighty days after the date of its enactment.

(b) Subsection (g) of section 552b of title 5, United States Code, as added by section 3(a) of this Act, shall take effect upon enactment.

Attest:

Clerk.

80-459 O - 77 - 47

The motion was agreed to.

The Senate bill was ordered to be read a third time, was read the third time and passed, and a motion to reconsider was laid on the table.

A similar House bill (H.R. 11656) was laid on the table.

[From the Congressional Record, Extension of Remarks, July 28, 1976]

(E 4148)

Legislative History of the Sunshine Act

Mr. McCloskey. Mr. Speaker, pursuant to the dialog with the gentleman from Massachusetts (Mr. Burke), I place this letter in the Record as part of the legislative history of the Sunshine Act:

Hon. Peter W. Rodino, Jr.,
Chairman, Committee on the Judiciary, House of Representatives, Washington, D.C.

Dear Mr. Chairman: The purpose of this letter is to inform you of this Department's views with regard to an amendment which we understand will be offered to H.R. 11656, the "Government in the Sunshine Act", when that bill is considered by the House of Representatives. We understand that Congressman McCloskey will offer an amendment to section 5(b) of the bill, which would amend the third exemption of the Freedom of Information Act—5 U.S.C. 552(b)(3).

The amendment which we understand Congressman McCloskey will offer on the Floor would revise subsection (b)(3) of the Freedom of Information Act to read as follows:

(b) This section does not apply to matters that are—

* * * * * * *

(3) Specifically exempted from disclosure by statute; provided: that such statute (A) requires that the matters be withheld from the public or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.

In summary, the Department would support this amendment if legislative history is provided to make clear that there is no intention in revising exemption 3 to invalidate certain statutory provisions administered by this Department designed to protect the privacy of personal information obtained by the Department. As so clarified, the amendment would substantially resolve a number of problems which we have noted in the version of the amendment contained in the bill as reported by the House Judiciary and Government Operations Committees.

Under section 5(b) of H.R. 11656 as reported by the House Judiciary Committee, the third exemption in the Freedom of Information Act would have been amended to exempt from disclosure only material required or permitted to be withheld from the public by any statute establishing particular criteria or referring to particular types of information. We have indicated that this provision may threaten the privacy of records relating to individuals maintained by the Social Security Administration and by other components of the Department.

There are a number of statutory provisions which currently authorize the Department to protect the privacy of information about individuals which is maintained by the Department. Principal among these provisions is section 1106 of the Social Security Act which provides that no disclosure may be made of certain Internal Revenue returns or of any other file, record, report, or other paper obtained by the Secretary in discharging his duties under that Act, except as the Secretary may prescribe by regulations. Section 406(d)(2) of the General Education Provisions Act and section 438(c) of that Act authorize the withholding of information on individuals and their families gathered in connection with certain statistical activities of the Education Division of this Department. Likewise, section 308(d) of the Public Health Service Act provides similar authority with regard to the release of information gathered in the course of health statistical activities and health research, evaluations, and demonstrations. We were concerned, however, that none of these provisions establishes

"particular criteria" or refers "to particular types of information" so as to fall within the third examption from the Freedom of Information Act as it would be amended by H.R. 11656 as reported.

We believe that the amendment which Congressman McCloskey intends to introduce will help to resolve the problems noted above. In particular, we believe that clause (A) of the amended provision, which refers to any statute that requires matters to be withheld from the public, would include the provisions of the Social Security Act, the General Education Provisions Act, and the Public Health Service Act referred to above which require the Department to withhold certain information from the public in the interest of protecting the privacy of individuals. To the extent that the proposed amendment is intended to accomplish this result, we fully support the amendment and urge that it be adopted. However, we would hope that the debate on this provision and the report of the Conferees on the bill (if a Conference is held and this provision is included in the bill as reported) clearly indicate that the statutory provisions referred to above, which are designed to protect the privacy of personal information, will remain in full force and effect.

The amendment to the Freedom of Information Act contained in this bill will, of course, affect other agencies of the Federal government. The views expressed above relate only to the effect of this amendment on programs of this Department and we defer to other affected agencies as to the desirability of this amendment from their standpoint.

We are advised by the Office of Management and Budget that there is no objection to the presentation of these views from the standpoint of the Administration's program.

Sincerely,

MARJORIE LYNCH,
Under Secretary.

CONFERENCE ACTION

CONFERENCE ACTION

[From the Congressional Record—Senate, July 29, 1976]

(S 12839)

Government in the Sunshine Act

Mr. Ribicoff. Mr. President, I ask the Chair to lay before the Senate a message from the House of Representatives on S. 5.

The Presiding Officer (Mr. Stone) laid before the Senate the amendment of the House of Representatives to the bill (S. 5) to provide that meetings of Government agencies shall be open to the public, and for other purposes.

(The amendment of the House is printed in the Record of July 28, 1976, beginning at page H7900.)

Mr. Ribicoff. Mr. President, I move that the Senate disagree to the amendment of the House of Representatives and request a conference with the House on the disagreeing of the two Houses thereon, and that the Chair be authorized to appoint the conferees on the part of the Senate.

The motion was agreed to; and the Presiding Officer appointed Mr. Ribicoff, Mr. Muskie, Mr. Metcalf, Mr. Chiles, Mr. Percy, Mr. Javits, and Mr. Roth conferees on the part of the Senate.

Mr. Pastore. Mr. President, I do not mean to be facetious about this, but I was very much interested in the fact that we have done something about sunshine. I hope we will begin to do something about sunset.

I came here early this morning, and the first vote was at 3:30. Now I am told we are going to be here until 8 o'clock tonight. It strikes me we ought to do the business of the Senate when we are wide awake during the sunshine period, and not wait for the sunset and the darkness before we get around to voting.

I would hope we would bear that in mind.

[From the Congressional Record—House, Aug. 3, 1976]

(H 8228)

Appointment of Conferees on S. 5, Government in the Sunshine Act

Mr. Brooks. Mr. Speaker, I ask unanimous consent to take from the Speaker's table the Senate bill (S. 5) to provide that meetings of Government agencies shall be open to the public, with the House amendments thereto, insist on the House amendments, and agree to the conference asked by the Senate.

The SPEAKER. Is there objection to the request of the gentleman from Texas? The Chair hears none, and appoints the following conferees: Messrs. BROOKS, MOSS, FASCELL, CONYERS, Ms. ABZUG, Messrs. FLOWERS, DANIELSON, Miss JORDAN, and Messrs. MAZZOLI, PATTISON of New York, HORTON, MCCLOSKEY, MOORHEAD of California and KINDNESS.

[CONFERENCE COMMITTEE PRINT]
August 5, 1976

THE GOVERNMENT IN THE SUNSHINE ACT

A COMPARISON OF THE HOUSE AND SENATE VERSIONS

75-141 O

U.S. GOVERNMENT PRINTING OFFICE 1976

SENATE BILL

94TH CONGRESS
1ST SESSION

S. 5

AN ACT

To provide that meetings of Government agencies shall be open to the public, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 SECTION 1. SHORT TITLE.—This Act may be cited as
4 the "Government in the Sunshine Act."

6 SEC. 2. DECLARATION OF POLICY.—It is hereby de-
7 clared to be the policy of the United States that the public
8 is entitled to the fullest practicable information regarding
9 the decisionmaking processes of the Federal Government.
10 It is the purpose of this Act to provide the public with such
11 information, while protecting the rights of individuals and
12 the ability of the Government to carry out its responsibilities.

HOUSE AMENDMENT

In the House of Representatives, U. S.,

July 28, 1976.

Resolved, That the bill from the Senate (S. 5) entitled "An Act to provide that meetings of Government agencies shall be open to the public, and for other purposes", do pass with the following

AMENDMENT:

Strike out all after the enacting clause, and insert:

3 *That this Act may be cited as the "Government in the*
4 *Sunshine Act".*

5 *DECLARATION OF POLICY*

6 *SEC. 2. It is hereby declared to be the policy of the*
7 *United States that the public is entitled to the fullest prac-*
8 *ticable information regarding the decisionmaking processes*
9 *of the Federal Government. It is the purpose of this Act to*
10 *provide the public with such information while protecting*
11 *the rights of individuals and the ability of the Government*
12 *to carry out its responsibilities.*

13 *OPEN MEETINGS*

14 *SEC. 3. (a) Title 5, United States Code, is amended by*
15 *adding after section 552a the following new section:*

SENATE BILL

2 SEC. 3. DEFINITIONS.—For purposes of this Act the
3 term, "person" includes an individual, partnership, cor-
4 poration, association, or public or private organization other
5 than an agency.

6 SEC. 4. (a) This section applies, according to the pro-
7 visions thereof, to the Federal Election Commission and to
8 any agency, as defined in section 551 (1) of title 5, United
9 States Code, where the collegial body comprising the agency
10 consists of two or more individual members, at least a major-
11 ity of whom are appointed to such position by the President
12 with the advice and consent of the Senate. Except as provided
13 in subsection (b), all meetings of such collegial body, or of
14 a subdivision thereof authorized to take action on behalf of
15 the agency, shall be open to the public. For purposes of this
16 section, a meeting means the deliberations of at least the
17 number of individual agency members required to take action
18 on behalf of the agency where such deliberations concern the
19 joint conduct or disposition of official agency business.

HOUSE AMENDMENT

1 "§ *552b. Open meetings*

2 *"(a) For purposes of this section—*

6 *"(1) the term 'agency' means the Federal Election*
7 *Commission and any agency, as defined in section 552*
8 *(e) of this title, headed by a collegial body composed of*
9 *two or more individual members, a majority of whom*
10 *are appointed to such position by the President with the*
11 *advice and consent of the Senate, and includes any sub-*
12 *division thereof authorized to act on behalf of the agency;*

15 *"(2) the term 'meeting' means a gathering to joint-*
16 *ly conduct or dispose of agency business by two or more,*
17 *but at least the number of individual agency members*
18 *required to take action on behalf of the agency, but*
19 *does not include gatherings required or permitted by*
20 *subsection (d); and*

21 *"(3) the term 'member' means an individual who*
22 *belongs to a collegial body heading an agency.*

23 *"(b)(1) Members as described in subsection (a)(2)*
24 *shall not jointly conduct or dispose of agency business with-*
25 *out complying with subsections (b) through (g).*

4 (b) Except where the agency finds that the public in-
5 terest requires otherwise, (1) subsection (a) shall not apply
6 to any agency meeting, or any portion of an agency meeting,
7 or to any meeting, or any portion of a meeting, of a sub-
8 division thereof authorized to take action on behalf of the
9 agency, and, (2) the requirements of subsections (c) and
10 (d) shall not apply to any information pertaining to such
11 meeting otherwise required by this section to be disclosed to
12 the public, where the agency, or the subdivision thereof con-
13 ducting the meeting, properly determines that such portion
14 or portions of its meeting, or such information, can be reason-
15 ably expected to—
16 (1) disclose matters (A) specifically authorized
17 under criteria established by an Executive order to be
18 kept secret in the interests of national defense or foreign
19 policy and (B) are in fact properly classified pursuant
20 to such Executive order;
21 (2) relate solely to the agency's own internal
22 personnel rules and practices;

HOUSE AMENDMENT

1 *"(2) Except as provided in subsection (c), every portion*
2 *of every meeting of an agency shall be open to public ob-*
3 *servation.*
4 *"(c) Except in a case where the agency finds that the*
5 *public interest requires otherwise, subsection (b) shall not*
6 *apply to any portion of an agency meeting and the require-*
7 *ments of subsections (d) and (e) shall not apply to any*
8 *information pertaining to such meeting otherwise required*
9 *by this section to be disclosed to the public, where the*
10 *agency properly determines that such portion or portions of*
11 *its meeting or the disclosure of such information is likely to—*

16 *"(1) disclose matters (A) specifically authorized*
17 *under criteria established by an Executive order to be*
18 *kept secret in the interests of national defense or foreign*
19 *policy and (B) in fact properly classified pursuant to*
20 *such Exectuive order;*
21 *"(2) relate solely to the internal personnel rules*
22 *and practices of an agency;*

1 (3) disclose information of a personal nature
2 where disclosure would constitute a clearly unwarranted
3 invasion of personal privacy;
4 (4) involve accusing any person of a crime, or
5 formally censuring any person;
6 (5) disclose information contained in investigatory
7 records compiled for law enforcement purposes, but
8 only to the extent that the disclosure would (A) inter-
9 fere with enforcement proceedings, (B) deprive a
10 person of a right to a fair trial or an impartial ad-
11 judication, (C) constitute an unwarranted invasion of
12 personal privacy, (D) disclose the identity of a con-
13 fidential source, (E) in the case of a record compiled
14 by a criminal law enforcement authority in the course
15 of a criminal investigation, or by an agency conducting
16 a lawful national security intelligence investigation, dis-
17 close confidential information furnished only by the con-
18 fidential source, (F) disclose investigative techniques
19 and procedures, or (G) endanger the life or physical
20 safety of law enforcement personnel;

22 (6) disclose trade secrets, or financial or com-
23 mercial information obtained from any person, where
24 such trade secrets or other information could not be ob-

HOUSE AMENDMENT

1 *"(6) disclose information of a personal nature*
2 *where disclosure would constitute a clearly unwarranted*
3 *invasion of personal privacy;*
4 *"(5) involve accusing any person of a crime, or*
5 *formally censuring any person;*
6 *"(7) disclose investigatory records compiled for*
7 *law enforcement purposes, or information which if*
8 *written would be contained in such records, but only*
9 *to the extent that the production of such records or*
10 *information would (A) interfere with enforcement*
11 *proceedings, (B) deprive a person of a right to a fair*
12 *trial or an impartial adjudication, (C) constitute an un-*
13 *warranted invasion of personal privacy, (D) disclose*
14 *the identity of a confidential source and, in the case of*
15 *a record compiled by a criminal law enforcement author-*
16 *ity in the course of a criminal investigation, or by an*
17 *agency conducting a lawful national security intelligence*
18 *investigation, confidential information furnished only by*
19 *the confidential source, (E) disclose investigative tech-*
20 *niques and procedures, or (F) endanger the life or*
21 *physical safety of law enforcement personnel;*
22 *"(4) disclose trade secrets and commercial or finan-*
23 *cial information obtained from a person and privileged*
24 *or confidential;*

80-459 O - 77 - 48

1 tained by the agency without a pledge of confidentiality,
2 or where such information must be withheld from the
3 public in order to prevent substantial injury to the com-
4 petitive position of the person to whom such information
5 relates;

6 (7) disclose information which must be withheld
7 from the public in order to avoid premature disclosure of
8 an action or a proposed action by—

9 (A) an agency which regulates currencies, se-
10 curities, commodities, or financial institutions where
11 such disclosure would (i) lead to significant finan-
12 cial speculation in currencies, securities, or commod-
13 ities, or (ii) significantly endanger the stability
14 of any financial institution;

15 (B) any agency where such disclosure would
16 significantly frustrate implementation of the pro-
17 posed agency action, or private action contingent
18 thereon; or

HOUSE AMENDMENT

6 *"(9) disclose information the premature disclosure*
7 *of which would—*

9 *"(A) in the case of an agency which regulates*
10 *currencies, securities, commodities, or financial in-*
11 *stitutions, be likely to (i) lead to significant financial*
12 *speculation, or (ii) significantly endanger the sta-*
13 *bility of any financial institution; or*

15 *"(B) in the case of any agency, be likely to*
16 *significantly frustrate implementation of a proposed*
17 *agency action, except that this subparagraph shall*
18 *not apply in any instance after the content or*
19 *nature of the proposed agency action has been*
20 *disclosed to the public by the agency, unless the*
21 *agency is required by law to make such disclosure*
22 *prior to taking final agency action on such proposal,*
23 *or after the agency publishes or serves a substantive*
24 *rule pursuant to section 553(d) of this title; or*

1 (C) any agency relating to the purchase by
2 such agency of real property.
3 This paragraph shall not apply in any instance where
4 the agency has already disclosed to the public the con-
5 tent or nature of its proposed action, or where the agency
6 is required by law to make such disclosure on its own
7 initiative prior to taking final agency action on such
8 proposal;
9 (8) disclose information contained in or related to
10 examination, operating, or condition reports prepared by,
11 on behalf of, or for the use of an agency responsible
12 for the regulation or supervision of financial institutions;
13 (9) specifically concern the agency's participation
14 in a civil action in Federal or State court, or the initia-
15 tion, conduct, or disposition by the agency of a particular
16 case of formal agency adjudication pursuant to the proce-
17 dures in section 554 of title 5, United States Code, or
18 otherwise involving a determination on the record after
19 opportunity for a hearing; or

22 (10) disclose information required to be withheld
23 from the public by any statute establishing par-

HOUSE AMENDMENT

9 "(8) disclose information contained in or related to
10 examination, operating, or condition reports prepared
11 by, on behalf of, or for the use of an agency responsible
12 for the regulation or supervision of financial institutions;
13 "(10) specifically concern the agency's issuance
14 of a subpena, or the agency's participation in a civil
15 action or proceeding, an action in a foreign court or
16 international tribunal, or an arbitration, or the initiation,
17 conduct, or disposition by the agency of a particular case
18 of formal agency adjudication pursuant to the procedures
19 in section 554 of this title or otherwise involving a
20 determination on the record after opportunity for a
21 hearing.
22 "(3) disclose matters specifically exempted from dis-
23 closure by statute (other than section 552 of this title):

1 ticular criteria or referring to particular types of
2 information.

5 (c) (1) Action under subsection (b) shall be taken only
6 when a majority of the entire membership of the agency, or
7 of the subdivision thereof authorized to conduct the meeting
8 on behalf of the agency, votes to take such action. A separate
9 vote of the agency members, or the members of a subdivision
10 thereof, shall be taken with respect to each agency meeting a
11 portion or portions of which are proposed to be closed to the
12 public pursuant to subsection (b), or with respect to any
13 information which is proposed to be withheld under subsec-
14 tion (b). A single vote may be taken with respect to a series
15 of meetings, a portion or portions of which are proposed to
16 be closed to the public, or with respect to any information
17 concerning such series of meetings, so long as each meeting in
18 such series involves the same particular matters, and is
19 scheduled to be held no more than thirty days after the initial
20 meeting in such series. The vote of each agency member par-
21 ticipating in such vote shall be recorded and no proxies shall
22 be allowed. However any person whose interests may be
23 directly affected by a meeting requests that the agency close
24 a portion or portions of the meeting to the public for any of

HOUSE AMENDMENT

1 *Provided, That such statute (A) requires that the mat-*
2 *ters be withheld from the public, or (B) establishes par-*
3 *ticular criteria for withholding or refers to particular*
4 *types of matters to be withheld;*
5 *"(d)(1) Action under subsection (c) to close a por-*
6 *tion or portions of an agency meeting shall be taken only*
7 *when a majority of the entire membership of the agency*
8 *votes to take such action. A separate vote of the agency*
9 *members shall be taken with respect to each agency meeting*
10 *a portion or portions of which are proposed to be closed to*
11 *the public pursuant to subsection (c). A single vote may*
12 *be taken with respect to a series of portions of meetings which*
13 *are proposed to be closed to the public, or with respect to any*
14 *information concerning such series, so long as each portion of*
15 *a meeting in such series involves the same particular matters,*
16 *and is scheduled to be held no more than thirty days after the*
17 *initial portion of a meeting in such series. The vote of each*
18 *agency member participating in such vote shall be recorded*
19 *and no proxies shall be allowed.*

22 *"(2) Whenever any person whose interests may be*
23 *directly affected by a portion of a meeting requests that the*
24 *agency close such portion to the public for any of the rea-*

1 the reasons referred to in paragraphs (3), (4), or (5) of
2 subsection (b), the agency shall vote whether to close such

4 meeting, upon request of any one of its members. Within one
5 day of any vote taken pursuant to this paragraph, the agency
6 shall make publicly available a written copy of such vote.
7 (2) If a meeting or portion thereof is closed to the
8 public, the agency shall, within one day of the vote taken
9 pursuant to paragraph (1) of this subsection, make publicly
10 available a full written explanation of its action closing the
11 meeting, or portion thereof, together with a list of all persons
12 expected to attend the meeting, and their affiliation.
13 (3) Any agency, a majority of whose meetings will
14 properly be closed to the public, in whole or in part, pursuant
15 to paragraphs (6), (7) (A), (8), or (9) of subsection (b),
16 or any combination thereof, may provide by regulation for
17 the closing of such meetings, or portion of such meetings, so
18 long as a majority of the members of the agency, or of the
19 subdivision thereof conducting the meeting, votes at the be-
20 ginning of such meeting, or portion thereof, to close the meet-
21 ing, and a copy of such vote is made available to the public.
22 The provisions of this subsection, and subsection (d), shall
23 not apply to any meeting to which such regulations apply:
24 *Provided*, That the agency shall, except to the extent that the

HOUSE AMENDMENT

1 *sons referred to in paragraph (5), (6), or (7) of subsec-*
2 *tion (c), the agency, upon request of any one of its members,*
3 *shall vote by recorded vote whether to close such meeting.*
4 *"(3) Within one day of any vote taken pursuant to*
5 *paragraph (1) or (2), the agency shall make publicly*
6 *available a written copy of such vote reflecting the vote of*
7 *each member on the question. If a portion of a meeting is*
8 *to be closed to the public, the agency shall, within one day*
9 *of the vote taken pursuant to paragraph (1) or (2) of this*
10 *subsection, make publicly available a full written explana-*
11 *tion of its action closing the portion together with a list of*
12 *all persons expected to attend the meeting and their affiliation.*
13 *"(4) Any agency, a majority of whose meetings may*
14 *properly be closed to the public pursuant to paragraph (4),*
15 *(8), (9)(A), or (10) of subsection (c), or any combina-*
16 *tion thereof, may provide by regulation for the closing of*
17 *such meetings or portions thereof in the event that a majority*
18 *of the members of the agency votes by recorded vote at the*
19 *beginning of such meeting, or portion thereof, to close the*
20 *exempt portion or portions of the meeting, and a copy of*
21 *such vote, reflecting the vote of each member on the ques-*
22 *tion, is made available to the public. The provisions of para-*
23 *graphs (1), (2), and (3) of this subsection and subsection*
24 *(e) shall not apply to any portion of a meeting to which*

1 provisions of subsection (b) may apply, provide the public
2 with public announcement of the date, place, and subject mat-
3 ter of the meeting at the earliest practicable opportunity.

8 (d) In the case of each meeting, the agency shall make
9 public announcement, at least one week before the meeting,
10 of the date, place, and subject matter of the meeting, whether
11 open or closed to the public, and the name and phone number
12 of the official designated by the agency to respond to requests
13 for information about the meeting. Such announcement shall
14 be made unless a majority of the members of the agency,
15 or of the members of the subdivision thereof conducting the
16 meeting, determines by a vote that agency business requires
17 that such meetings be called at an earlier date, in which case
18 the agency shall make public announcement of the date,
19 place, and subject matter of such meeting, and whether open
20 or closed to the public, at the earliest practicable opportunity.
21 The subject matter of a meeting, or the determination of the
22 agency to open or close a meeting, or portion of a meeting,
23 to the public, may be changed following the public announce-
24 ment required by this paragraph if, (1) a majority of the

HOUSE AMENDMENT

1 *such regulations apply: Provided, That the agency shall,*
2 *except to the extent that such information is exempt from*
3 *disclosure under the provisions of subsection (c), provide*
4 *the public with public announcement of the date, place, and*
5 *subject matter of the meeting and each portion thereof at*
6 *the earliest practicable time and in no case later than the*
7 *commencement of the meeting or portion in question.*
8 *"(e) In the case of each meeting, the agency shall make*
9 *public announcement, at least one week before the meeting,*
10 *of the date, place, and subject matter of the meeting, whether*
11 *it is to be open or closed to the public, and the name and*
12 *phone number of the official designated by the agency to*
13 *respond to requests for information about the meeting. Such*
14 *announcement shall be made unless a majority of the mem-*
15 *bers of the agency determines by a recorded vote that agency*
16 *business requires that such meeting be called at an earlier*
17 *date, in which case the agency shall make public announce-*
18 *ment of the date, place, and subject matter of such meeting,*
19 *and whether open or closed to the public, at the earliest*
20 *practicable time and in no case later than the commence-*
21 *ment of the meeting or portion in question. The time, place,*
22 *or subject matter of a meeting, or the determination of the*
23 *agency to open or close a meeting, or portion of a meeting,*
24 *to the public, may be changed following the public announce-*

1 entire membership of the agency, or of the subdivision
2 thereof conducting the meeting, determines by a vote that
3 agency business so requires, and that no earlier announce-
4 ment of the change was possible, and, (2) the agency pub-
5 licly announces such change at the earliest practicable oppor-
6 tunity. Immediately following the public announcement re-
7 quired by this paragraph, notice of such announcement shall
8 also be submitted for publication in the Federal Register.
9 (e) A complete transcript or electronic recording ade-
10 quate to fully record the proceedings shall be made of each
11 meeting, or portion of a meeting, closed to the public, ex-
12 cept for a meeting, or portion of a meeting, closed to the
13 public pursuant to paragraph (9) of subsection (b). The
14 agency shall make promptly available to the public, in a place
15 easily accessible to the public, the complete transcript or elec-
16 tronic recording of the discussion at such meeting of any
17 item on the agenda, or of the testimony of any witness re-
18 ceived at such meeting, where no significant portion of such
19 discussion or testimony contains any information specified
20 in paragraphs (1) through (10) of subsection (b). Copies
21 of such transcript, or a transcription of such electronic re-
22 cording disclosing the identity of each speaker, shall be fur-
23 nished to any person at the actual cost of duplication or
24 transcription. The agency shall maintain a complete ver-
25 batim copy of the transcript, or a complete electronic record-

HOUSE AMENDMENT

1 *ment required by this paragraph only if (1) a majority of*
2 *the entire membership of the agency determines by a re-*
3 *corded vote that agency business so requires and that no*
4 *earlier announcement of the change was possible, and (2)*
5 *the agency publicly announces such change and the vote*
6 *of each member upon such change at the earliest practicable*
7 *time and in no case later than the commencement of the*
8 *meeting or portion in question.*

9 *"(f)(1) For every meeting closed pursuant to para-*
10 *graphs (1) through (10) of subsection (c), the General*
11 *Counsel or chief legal officer of the agency shall publicly*
12 *certify that, in his opinion, the meeting may be closed to the*
13 *public and shall state the relevant exemptive provision. A*
14 *copy of such certification, together with a statement from the*
15 *presiding officer of the meeting setting forth the date, time,*
16 *and place of the meeting, the persons present, the generic sub-*
17 *ject matter of the discussion at the meeting, and the actions*
18 *taken, shall be incorporated into minutes retained by the*
19 *agency.*

20 *"(2) Written minutes shall be made of any agency meet-*
21 *ing, or portion thereof, which is open to the public. The*
22 *agency shall make such minutes promptly available to the*
23 *public in a location easily accessible to the public, and shall*
24 *maintain such minutes for a period of at least two years after*
25 *such meeting. Copies of such minutes shall be furnished to*

1 ing of each meeting, or portion of a meeting, closed to the
2 public, for a period of at least two years after such meeting,
3 or until one year after the conclusion of any agency pro-
4 ceeding with respect to which the meeting, or a portion
5 thereof, was held, whichever occurs later.

6 (f) Each agency subject to the requirements of this sec-
7 tion shall, within one hundred and eighty days after the en-
8 actment of this Act, following consultation with the Office of
9 the Chairman of the Administrative Conference of the United
10 States and published notice in the Federal Register of at least
11 thirty days and opportunity for written comment by any
12 persons, promulgate regulations to implement the require-
13 ments of subsections (a) through (e) of this section. Any
14 person may bring a proceeding in the United States Dis-
15 trict Court for the District of Columbia to require an agency
16 to promulgate such regulations if such agency has not pro-
17 mulgated such regulations within the time period specified
18 herein. Any person may bring a proceeding in the United
19 States Court of Appeals for the District of Columbia to set
20 aside agency regulations issued pursuant to this subsection
21 that are not in accord with the requirements of subsections
22 (a) through (e) of this section, and to require the promulga-
23 tion of regulations that are in accord with such subsections.

HOUSE AMENDMENT

1 *any person at no greater than the actual cost of duplication*
2 *thereof or, if in the public interest, at no cost.*

6 *"(g) Each agency subject to the requirements of this*
7 *section shall, within 180 days after the date of enactment*
8 *of this section, following consultation with the Office of the*
9 *Chairman of the Administrative Conference of the United*
10 *States and published notice in the Federal Register of at*
11 *least thirty days and opportunity for written comment by*
12 *any persons, promulgate regulations to implement the re-*
13 *quirements of subsections (b) through (f) of this section.*
14 *Any person may bring a proceeding in the United States*
15 *District Court for the District of Columbia to require an*
16 *agency to promulgate such regulations if such agency has*
17 *not promulgated such regulations within the time period*
18 *specified herein. Subject to any limitations of time therefor*
19 *provided by law, any person may bring a proceeding in*
20 *the United States Court of Appeals for the District of Colum-*
21 *bia to set aside agency regulations issued pursuant to this*
22 *subsection that are not in accord with the requirements of*
23 *subsections (b) through (f) of this section, and to require*
24 *the promulgation of regulations that are in accord with such*
25 *subsections.*

1 (g) The district courts of the United States have juris-
2 diction to enforce the requirements of subsections (a) through
3 (e) of this section by declaratory judgment, injunctive relief,
4 or other relief as may be appropriate. Such actions may be
5 brought by any person against an agency or its members
6 prior to, or within sixty days after, the meeting out of which
7 the violation of this section arises, except that if public an-
8 nouncement of such meeting is not initially provided by the
9 agency in accordance with the requirements of this section,
10 such action may be instituted pursuant to this section at any
11 time prior to sixty days after any public announcement of
12 such meeting. Before bringing such action, the plaintiff
13 shall first notify the agency of his intent to do so, and allow
14 the agency a reasonable period of time, not to exceed ten
15 days, to correct any violation of this section, except that
16 such reasonable period of time shall not be held to exceed
17 two working days where notification of such violation is
18 made prior to a meeting which the agency has voted to close.
19 Such actions may be brought in the district wherein the
20 plaintiff resides, or has his principal place of business, or
21 where the agency in question has its headquarters. In such
22 actions a defendant shall serve his answer within twenty days
23 after the service of the complaint. The burden is on the
24 defendant to sustain his action. In deciding such cases the

HOUSE AMENDMENT

1 *"(h) The district courts of the United States have juris-*
2 *diction to enforce the requirements of subsection (b)*
3 *through (f) of this section. Such actions may be brought by*
4 *any person against an agency prior to, or within sixty days*
5 *after, the meeting out of which the violation of this section*
6 *arises, except that if public announcement of such meeting*
7 *is not initially provided by the agency in accordance with*
8 *the requirements of this section, such action may be instituted*
9 *pursuant to this section at any time prior to sixty days after*
10 *any public announcement of such meeting. Such actions may*
11 *be brought in the district court of the United States for the*
12 *district in which the agency meeting is held, or in the District*
13 *Court for the District of Columbia, or where the agency in*
14 *question has its headquarters. In such actions a defendant*
15 *shall serve his answer within twenty days after the service*
16 *of the complaint, but such time may be extended by the*
17 *court for up to twenty additional days upon a showing of*
18 *good cause therefor. The burden is on the defendant to*
19 *sustain his action. In deciding such cases the court may*
20 *examine in camera any portion of the minutes of a meeting*
21 *closed to the public, and may take such additional evidence*
22 *as it deems necessary. The court, having due regard for*
23 *orderly administration and the public interest, as well as the*
24 *interests of the party, may grant such equitable relief as it*

80-459 O - 77 - 49

1 court may examine in camera any portion of a transcript or
2 electronic recording of a meeting closed to the public, and
3 may take such additional evidence as it deems necessary. The
4 court, having due regard for orderly administration and the
5 public interest, as well as the interests of the party, may
6 grant such equitable relief as it deems appropriate, includ-
7 ing granting an injunction against future violations of this
8 section, or ordering the agency to make available to the public
9 the transcript or electronic recording of any portion of a
10 meeting improperly closed to the public. Except to the extent
11 provided in subsection (h) of this section, nothing in this sec-
12 tion confers jurisdiction on any district court to set aside
13 or invalidate any agency action taken or discussed at an
14 agency meeting out of which the violation of this section
15 arose.

16 (h) Any Federal court otherwise authorized by law to
17 review agency action may, at the application of any person
18 properly participating in the proceeding pursuant to other
19 applicable law, inquire into violations by the agency of the
20 requirements of this section, and afford any such relief as it
21 deems appropriate.

22 (i) The court may assess against any party reason-
23 able attorney fees and other litigation costs reasonably in-
24 curred by any other party who substantially prevails in any
25 action brought in accordance with the provisions of sub-

HOUSE AMENDMENT

1 *deems appropriate, including granting an injunction against*
2 *future violations of this section, or ordering the agency to*
3 *make available to the public such portion of the minutes of*
4 *a meeting as is not authorized to be withheld under section (c)*
5 *of this section. Nothing in this section confers jurisdiction on*
6 *any district court acting solely under this subsection to set*
7 *aside, enjoin or invalidate any agency action taken or dis-*
8 *cussed at an agency meeting out of which the violation of this*
9 *section arose.*

22 *"(i) The court may assess against any party rea-*
23 *sonable attorney fees and other litigation costs reasonably*
24 *incurred by any other party who substantially prevails in*
25 *any action brought in accordance with the provisions of*

1 section (f), (g), or (h) of this section. Costs may be
2 assessed against an individual member of an agency only in
3 the case where the court finds such agency member has
4 intentionally and repeatedly violated this section, or against
5 the plaintiff where the court finds that the suit was initiated
6 by the plaintiff for frivolous or dilatory purposes. In the
7 case of apportionment of costs against an agency, the costs
8 may be assessed by the court against the United States.

9 (j) The agencies subject to the requirements of this
10 section shall annually report to Congress regarding their
11 compliance with such requirements, including a tabulation
12 of the total number of agency meetings open to the public,
13 the total number of meetings closed to the public, the rea-
14 sons for closing such meetings, and a description of any
15 litigation brought against the agency under this section.

[See section 6 (a) of the Senate bill.]

HOUSE AMENDMENT

1 *subsection (g) or (h) of this section, except that costs may*
2 *be assessed against the plantiff only where the court finds*
3 *that the suit was initiated by the plaintiff primarily for*
4 *frivolous or dilatory purposes. In the case of assessment of*
5 *costs against an agency, the costs may be assessed by the*
6 *court against the United States.*

9 *"(j) Each agency subject to the requirements of this*
10 *section shall annually report to Congress regarding its com-*
11 *pliance with such requirements, including a tabulation of the*
12 *total number of agency meetings open to the public, the*
13 *total number of meetings closed to the public, the reasons*
14 *for closing such meetings, and a description of any litigation*
15 *brought against the agency under this section, including any*
16 *costs assessed against the agency in such litigation (whether*
17 *or not paid by the agency).*
18 *"(k) Except as specifically provided in this section,*
19 *nothing herein expands or limits the present rights of any*
20 *person under section 552 of this title, except that the pro-*
21 *visions of this Act shall govern in the case of any request*
22 *made pursuant to such section to copy or inspect the minutes*
23 *described in subsection (f) of this section. The requirements*
24 *of chapter 33 of title 44, United States Code, shall not apply*
25 *to the minutes described in subsection (f) of this section.*

SENATE BILL

[See the last sentence of section 6 (a) of the Senate bill.]

[See section 6 (b) of the Senate bill.]

19 SEC. 5. (a) Section 557 of title 5, United States Code,
20 is amended by adding at the end thereof the following new
21 subsection:
22 "(d) In any agency proceeding which is subject to sub-
23 section (a) of this section, except to the extent required for
24 the disposition of ex parte matters as authorized by law—

HOUSE AMENDMENT

1 *"(l) This section does not constitute authority to withhold*
2 *any information from Congress, and does not authorize the*
3 *closing of any agency meeting or portion thereof otherwise*
4 *required by law to be open.*

5 *"(m) Nothing in this section authorizes any agency to*
6 *withhold from any individual any record, including minutes*
7 *required by this Act, which is otherwise accessible to such*
8 *individual under section 552a of this title.*

9 *"(n) In the event that any meeting is subject to the*
10 *provisions of the Federal Advisory Committee Act as well*
11 *as the provisions of this section, the provisions of this sec-*
12 *tion shall govern.".*

13 *(b) The chapter analysis of chapter 5 of title 5, United*
14 *States Code, is amended by inserting:*

15 *"552b. Open meetings."*

16 *immediately below:*

17 *"552a. Records about individuals.".*

18 *EX PARTE COMMUNICATIONS*

19 *SEC. 4. (a) Section 557 of title 5, United States Code,*
20 *is amended by adding at the end thereof the following new*
21 *subsection:*

22 *"(d)(1) In any agency proceeding which is subject to*
23 *subsection (a) of this section, except to the extent required*
24 *for the disposition of ex parte matters as authorized by law—*

1 "(1) no interested person outside the agency shall
2 make or knowingly cause to be made to any member of
3 the body comprising the agency, administrative law
4 judge, or other employee who is or may reasonably be
5 expected to be involved in the decisional process of the
6 proceeding, an ex parte communication relevant to the
7 merits of the proceeding;
8 "(2) no member of the body comprising the agency,
9 administrative law judge, or other employee who is or
10 may reasonably be expected to be involved in the deci-
11 sional process of the proceeding, shall make or know-
12 ingly cause to be made to an interested person outside the
13 agency an ex parte communication relevant to the merits
14 of the proceeding;
15 "(3) a member of the body comprising the agency,
16 administrative law judge, or other employee who is or
17 may reasonably be expected to be involved in the deci-
18 sional process of such proceeding who receives, or who
19 makes, a communication in violation of this subsection,
20 shall place on the public record of the proceeding:

22 "(A) written communications transmitted in
23 violation of this subsection;

HOUSE AMENDMENT

1 *"(A) no interested person outside the agency shall*
2 *make or cause to be made to any member of the body*
3 *comprising the agency, administrative law judge, or*
4 *other employee who is or may reasonably be expected*
5 *to be involved in the decisional process of the proceed-*
6 *ing, an ex parte communication relative to the merits*
7 *of the proceeding;*
8 *"(B) no member of the body comprising the agen-*
9 *cy, administrative law judge, or other employee who*
10 *is or may reasonably be expected to be involved in*
11 *the decisional process of the proceeding, shall make or*
12 *cause to be made to any interested person outside the*
13 *agency an ex parte communication relative to the merits*
14 *of the proceeding;*
15 *"(C) a member of the body comprising the agency,*
16 *administrative law judge, or other employee who is or*
17 *may reasonably be expected to be involved in the de-*
18 *cisional process of such proceeding who receives, or*
19 *who makes or causes to be made, a communication pro-*
20 *hibited by this subsection shall place on the public record*
21 *of the proceedings:*
22 *"(i) all such written communications;*

1 "(B) memorandums stating the substance of all
2 oral communications occurring in violation of this
3 subsection; and
4 "(C) responses to the materials described in
5 subparagraphs (A) and (B) of this subsection;

8 "(4) upon receipt of a communication knowingly
9 made by a party, or which was knowingly caused to be
10 made by a party in violation of this subsection; the
11 agency, administrative law judge, or other employee
12 presiding at the hearing may, to the extent consistent
13 with the interests of justice and the policy of the under-
14 lying statutes, require the person or party to show cause
15 why his claim or interest in the proceeding should not
16 be dismissed, denied, disregarded, or otherwise adversely
17 affected by virtue of such violation;
18 "(5) the prohibitions of this subsection shall apply
19 at such time as the agency may designate, but in no case
20 shall they apply later than the time at which a proceed-
21 ing is noticed for hearing unless the person responsible
22 for the communication has knowledge that it will be
23 noticed, in which case the prohibitions shall apply at the
24 time of his acquisition of such knowledge.".

HOUSE AMENDMENT

1 *"(ii) memoranda stating the substance of all*
2 *such oral communications; and*

4 *"(iii) all written responses, and memoranda*
5 *stating the substance of all oral responses, to the*
6 *materials described in clauses (i) and (ii) of this*
7 *subparagraph;*
8 *"(D) in the event of a communication prohibited*
9 *by this subsection and made or caused to be made by a*
10 *party or interested person, the agency, administrative*
11 *law judge, or other employee presiding at the hearing*
12 *may, to the extent consistent with the interests of justice*
13 *and the policy of the underlying statutes, require the*
14 *person or party to show cause why his claim or interest*
15 *in the proceeding should not be dismissed, denied, dis-*
16 *regarded, or otherwise adversely affected on account of*
17 *such violation; and*
18 *"(E) the prohibitions of this subsection shall apply*
19 *beginning at such time as the agency may designate,*
20 *but in no case shall they begin to apply later than the*
21 *time at which a proceeding is noticed for hearing unless*
22 *the person responsible for the communication has knowl-*
23 *edge that it will be noticed, in which case the prohibi-*
24 *tions shall apply beginning at the time of his acquisition*
25 *of such knowledge.*

3 (b) Section 551 of title 5, United States Code, is
4 amended—
5 (1) by striking out "and" at the end of paragraph
6 (12);
7 (2) by striking out the "act." at the end of para-
8 graph (13) and inserting in lieu thereof "act; and"

10 (3) by adding at the end thereof the following new
11 paragraph:
12 "(14) 'ex parte communication' means an oral or
13 written communication not on the public record with
14 respect to which reasonable prior notice to all parties is
15 not given.".

18 (c) Section 556(d) of title 5, United States Code, is
19 amended by inserting between the third and fourth sentences
20 thereof the following new sentence: "The agency may, to the
21 extent consistent with the interests of justice and the policy
22 of the underlying statutes administered by the agency, con-
23 sider a violation of section 557(d) of this title sufficient

HOUSE AMENDMENT

1 *"(2) This section does not constitute authority to with-*
2 *hold information from Congress.".*
3 *(b) Section 551 of title 5, United States Code, is*
4 *amended—*
5 *(1) by striking out "and" at the end of paragraph*
6 *(12);*
7 *(2) by striking out the "act." at the end of para-*
8 *graph (13) and inserting in lieu thereof "act; and";*
9 *and*
10 *(3) by adding at the end thereof the following new*
11 *paragraph:*
12 *"(14) 'ex parte communication' means an oral or*
13 *written communication not on the public record with*
14 *respect to which reasonable prior notice to all parties*
15 *is not given; but it shall not include requests for informa-*
16 *tion on or status reports relative to any matter or pro-*
17 *ceeding covered by this subchapter.".*
18 *(c) Section 556(d) of title 5, United States Code, is*
19 *amended by inserting between the third and fourth sentences*
20 *thereof the following new sentence: "The agency may, to*
21 *the extent consistent with the interests of justice and the*
22 *policy of the underlying statutes administered by the agency,*
23 *consider a violation of section 557(d) of this title sufficient*

1 grounds for a decision adverse to a party who has knowingly
2 committed such violation or knowingly caused such violation
3 to occur.".

4 SEC. 6. (a) Except as specifically provided by section
5 4, nothing in section 4 confers any additional rights on
6 any person, or limits the present rights of any such person,
7 to inspect or copy, under section 552 of title 5, United
8 States Code, any documents or other written material
9 within the possession of any agency. In the case of any
10 request made pursuant to section 552 of title 5, United
11 States Code, to copy or inspect the transcripts or electr
12 recordings described in section 4 (e), the provisions of
13 Act shall govern whether such transcripts or electroni
14 cordings shall be made available in accordance with such
15 request. The requirements of chapter 33 of title 44, United
16 States Code, shall not apply to the transcripts and electronic
17 recordings described in section 4 (e). This Act does not
18 authorize any information to be withheld from Congress.

19 (b) Nothing in section 4 authorizes any agency to
20 withhold from any individual any record, including tran-
21 scripts or electronic recordings required by this Act, which
22 is otherwise accessible to that individual under section 552a
23 of title 5, United States Code.

HOUSE AMENDMENT

1 *grounds for a decision adverse to a person or party who has*
2 *committed such violation or caused such violation to occur.*".

[See subsection (k) of 5 U.S.C. 552b as added by the House amendment.]

[See subsection (l) of 5 U.S.C. 552b as added by the House amendment.]

[See subsection (m) of 5 U.S.C. 552b as added by the House amendment.]

SENATE BILL

HOUSE AMENDMENT

1 *CONFORMING AMENDMENTS*

2 *SEC. 5. (a) Section 410(b(1) of title 39, United*
3 *States Code, is amended by inserting after "Section 552*
4 *(public information)," the words "section 552a (records*
5 *about individuals), section 552b (open meetings),".*

6 *(b) Section 552(b)(3) of title 5, United States Code,*
7 *is amended to read as follows:*

8 *"(3) specifically exempted from disclosure by statute*
9 *(other than Section 552b of this title): Provided, That*
10 *such statute (A) requires that the matters be withheld*
11 *from the public, or (B) establishes particular criteria*
12 *for withholding or refers to particular types of matters*
13 *to be withheld;"; and*

14 *(c) Subsection (d) of section 10 of the Federal Ad-*
15 *visory Committee Act is amended by striking out the first*
16 *sentence and inserting in lieu thereof the following: "Sub-*
17 *sections (a)(1) and (a)(3) of this section shall not apply*
18 *to any portion of an advisory committee meeting where the*
19 *President, or the head of the agency to which the advisory*
20 *committee reports, determines that such portion of such*
21 *meeting may be closed to the public in accordance with sub-*
22 *section (c) of section 552b of title 5, United States Code.".*

80-459 O - 77 - 50

2 SEC. 7. The provisions of this Act shall become effec-
3 tive one hundred and eighty days after the date on which
4 this Act is enacted, except that the provisions of section 4
5 requiring the issuance of regulations to implement such sec-
6 tion shall become effective upon enactment.

Passed the Senate November 6, 1975.

Attest:

Secretary.

HOUSE AMENDMENT

1 *EFFECTIVE DATE*

2 *SEC. 6. (a) Except as provided in subsection (b) of*
3 *this section, the provisions of this Act shall take effect one*
4 *hundred and eighty days after the date of its enactment.*

5 *(b) Subsection (g) of section 552b of title 5, United*
6 *States Code, as added by section 3(a) of this Act, shall take*
7 *effect upon enactment.*

Attest:

Clerk.

MEMORANDUM OF DIFFERENCES BETWEEN HOUSE AND SENATE VERSIONS

Part I

1. DEFINITION OF MEETING AND RELATED TERMS

(a) Definition of meeting

Senate defines meeting to mean "the *deliberations* of at least the number of individual agency members required to take action on behalf of the agency where such *deliberations* concern the joint conduct or disposition of official agency business." House defines meeting to mean "a *gathering* to jointly conduct or dispose of agency business *by two or more*, but at least the number of individual agency members required to take action on behalf of the agency."

Senate section 3(a) on p. 2, lines 16–19*

House section 3(a)—5 USC 552b(a)(2) on p. 2, lines 12–18

(b) Types of meetings covered

Senate includes in bill's open meeting requirements all deliberations falling within the Act's definition of a meeting.

The House exempts from the bill's definition of a meeting "gatherings required or permitted by subsection (d)." Pursuant to subsection (d) an agency may choose to meet to consider whether a subsequent meeting should be open or closed under this Act.

Senate section 3(a) on p. 2, lines 16–19

House section 3(a)—5 USC 552b(a)(2) on p. 2, lines 15–18

(c) Definition of a member

The Senate does not separately define the term *member* of an agency. The House defines member to mean "an individual who belongs to a collegial body heading an agency."

House section 3(a)—5 USC 552b(a)(3) on p. 2, lines 21–22

(d) Prohibition against noncompliance with Act

The House, in addition to requiring agency meetings to be open, provides that "members as described in subsection (a)(2) shall not jointly conduct or dispose of agency business without complying with subsections (b) through (g)." The Senate does not contain this additional provision.

House section 3(a)—5 USC 552b(b)(1) on p. 2, lines 23–25

2. EXEMPTION FOR PREMATURE DISCLOSURE OF INFORMATION

(a) Applicability of exemption's qualifying language to financial agencies

Senate provision qualifying the exemption for premature disclosure of certain information applies to the entire exemption, including the portion applicable to an agency which regulates currencies, securities, commodities, or financial institutions. In the comparable House provision, the qualifications on the exemption do not apply to agencies which regulate currencies, securities, commodities, or financial institutions.

Senate section 4(b)(7) on p. 6, lines 3–8

House section 3(a)—5 USC 552b(c)(9) on p. 5, lines 17–24

(b) Wording of exemption's qualifying language

Senate language qualifying the applicability of the prematurity exemption reads:

"This paragraph shall not apply in any instance where the agency has already disclosed to the public the content or nature of its proposed action, *or where* the agency is required by law to make such disclosure *on its own initiative* prior to taking final agency action on such proposal;"

---

*Page and line numbers refer to comparative print of S. 5 [pp. 730 through 771, supra].

House language qualifying the applicability of the prematurity exemption reads:

"Except that this subparagraph shall not apply in any instance after the content or nature of the proposed agency action has been disclosed to the public by the agency, *unless* the agency is required by law to make such disclosure prior to taking final agency action on such proposal, *or after the agency publishes or serves a substantive rule pursuant to section 553(d) of this title;*"

Senate section 4(b) (7) on p. 6, lines 3–8

House section 3(a)—5 USC 552b(c) (9) on p. 5, lines 17–24

3. EXEMPTION FOR LIMITATIONS ON DISCLOSURES IN OTHER STATUTES

(*a*) *Sunshine Act provision*

The Senate permits an agency to close a meeting to protect "information required to be withheld by any other statute establishing *particular criteria or referring to particular types of information.*" The comparable House clause exempts: "Matters specifically exempted from disclosure by statute (other than section 552 of this title): Provided that such statute (A) *requires that the matters be withheld from the public or* (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;"

Senate section 4(b) (10) on p. 6, lines 22—p. 7, line 2

House section 3(a)—5 USC 552b(c) (3) on p. 6, line 22—p. 7, line 4

(*b*) *Freedom of Information Act Provision*

The Senate requires an agency to keep a transcript or electronic recording of Information Act exempting from disclosure information specifically exempted by other statutes. The House Act amends the comparable provision in the Freedom of Information Act so it conforms to the Sunshine Act exemption.

House section 5(b) on p. 20, lines 6–13

4. REQUIREMENTS FOR TRANSCRIPTS OR MINUTES

The Senate requires an agency to keep a transcript or electronic recording of closed agency meetings. The transcripts or electronic recordings must be maintained for at least two years but disclosure of transcripts containing sensitive matters is protected. There is no requirement that the agency prepare minutes of open or closed meetings. The House does not require an agency to keep transcripts of open or closed meetings. Instead, it requires the General Counsel to certify publicly that the meeting may be closed under one of the exemptions and to state the relevant exemption. This must be included in minutes kept of the closed meeting. Minutes of closed meetings must include information on the generic subject matter of the meeting and actions taken on them. The House also requires each agency to maintain and disclose minutes of open meetings. The minutes of open meetings, but not closed meetings, must be kept for at least 2 years.

Senate section 4(e) on p. 10, line 9–p. 11, line 5

House section 3(a)—5 USC 552b(f)-line 9 on p. 10, p. 11, line 2

5. VENUE

The Senate provides suit may be brought where the headquarters of the agency is located or where the plaintiff resides. In the House, suit may be brought where the headquarters of the agency is located, the D.C. District Court, or the place where meeting is held.

Senate section 4(g) on p. 12, lines 19–21

House section 3(a)—5 USC 552b(h) on p. 12, lines 10–14

6. REVIEW BY APPELLATE COURT OF COMPLIANCE WITH ACT

The Senate provides that a court that otherwise has jurisdiction to review an agency's final action may, as part of that review, "inquire into violations by the agency of the requirements of this section, and afford any such relief as it deems appropriate." The House Act contains no comparable provision.

Senate section 4(h) on p. 13, lines 16–21

7. PERSONAL LIABILITY OF AGENCY MEMBERS FOR LITIGATION COSTS

The Senate authorizes an individual agency member to be named as a defendant. It permits a court to assess reasonable attorney fees and other litigation costs against an agency member only if the agency member has intentionally and repeatedly violated the Act. The House bill does not provide that suit may be brought against an individual agency member, or provide that litigation fees may be assessed against him.

Senate section 4(i) on p. 13, line 22–p. 14, line 4. Senate section 4(g) on p. 12, line 5

8. EX PARTE COMMUNICATIONS

(*a*) *Definition of ex parte communications*

The Senate bill prohibits "ex parte communications relevant to the merits." The House bill contains a similar phrase, but in addition specifies that an ex parte communication "shall not include requests for information on or status reports relative to any matter or proceeding covered by this subchapter."

Senate section 4(b)(3) on p. 18, lines 10–15

House section 4(b)(3) on p. 18, lines 10–17

(*b*) *Applicability of prohibition to person who causes ex parte communications*

The Senate prohibits an interested person from making, or *knowingly causing* to be made, an ex parte communication. The comparable House wording prohibits any interested person from making, or *causing* to be made, an ex parte communication, without reference to the word *knowingly*.

Senate section 5(a)—5 USC 557(d) and House section 4(a)—5 USC 557(d)(1) See p. 16, line 2, and lines 11–12

(*c*) *Applicability of agency sanctions to party who makes or causes ex parte communication*

The Senate provides that upon receipt of an ex parte communication *knowingly* made or *knowingly* caused to be made by a party, the agency may require the party to show cause why his claim should not be adversely affected, and authorizes the agency to rule against a party who has *knowingly* committed a violation of the rules against ex parte communications, or *knowingly* caused such a violation. The House provides for similar remedies in the event of an ex parte communication, but does not require that the communication be made *knowingly*.

Senate section 5(a)—5 USC 557(d)(1)-(2) and House section 4(a)—5 USC 557(d)(1)(A)-(B). See p. 16, line 2 and line 11

Senate section 5(a)—5 USC 557(d)(4) and House section 4(a)—5 USC 557 (d)(1)(D). See p. 17, lines 8–10

Senate section 5(c) and House section 4(c). See p. 19, lines 1–3

(*d*) *Duty of disclosure placed on official who causes an ex parte communication to be made*

The Senate requires an agency official who receives or who makes an ex parte communication to place information about it on the public record. The House requires an agency official who receives or who makes, *or causes to be made*, an ex parte communication to place information about it on the public record.

Senate section 5(a)—5 USC 557(d)(3) and House section 4(a)—5 USC 557(d)(1)(C). See page 16, line 19

9. FEDERAL ADVISORY COMMITTEE ACT

The House amends the Federal Advisory Committee Act so that an advisory committee meeting may be closed for the same reasons applicable under the Sunshine Act to the closing of an agency meeting. The Senate contains no comparable amendment of the Federal Advisory Committee Act.

House section 5(c) on page 20, lines 14–22

PART II *

1. Senate section 3 (P. 2, 1, 2–5)

Senate contains Administrative Procedure Act definition of *person* (5 U.S.C. 551(2)). Bill not enacted as amendment to APA.

House section 3(a) (2:1–2)

House has no definition of *person.* Bill is in form of an amendment to the APA and therefore automatically includes APA's definition of *person.*

Possible compromise

House provision.

2. Senate section 4(a) (2:6–12)

Senate specifically refers to Federal Election Commission. In describing bill's coverage, incorporates definition of *agency* from 5 U.S.C 551(1). Does not define term to include subdivision of agency. Refers to the collegial body *comprising* the agency.

House section 3(a)—5 U.S.C. 552b(a)(1) (2:6–12)

House specifically refers to Federal Election Commission. Incorporates definition of *agency* from Freedom of Information Act. Defines term to include subdivision of agency. Describes agency as *headed* by a collegial body.

Possible compromise

Remove reference to Election Commission (subject to approval of Parliamentarian), and otherwise use House provision (with clarification in report of when an agency is *headed* by a collegial body).

3. Senate section 4(a) (2:12–15)

Senate requires all meetings of the collegial body or a subdivision authorized to take action on behalf of the agency to be open to the public. Provision does not refer to portion of a meeting.

House section 3(a)—5 U.S.C. 552b(b)(2) (3:1–3)

House requires that every *portion* of every meeting shall be open to public *observation.*

Possible compromise

House provision.

4. Senate section 4(b) (3:14–15)

Senate introductory wording makes exemptions applicable to information that "can be reasonably expected to" disclose matters specified in rest of subsection.

House section 3(a)—5 USC 552b(c) (3:11)

House introductory language makes exemptions applicable to information that "is likely to" disclose matters specified in rest of subsection. Exemptions explicitly made applicable to *disclosure* of information.

Possible compromise

House provision, with report to explain conferees' understanding that standard is more likely than not.

5. Senate section 4(b)(2) (3:21–22)

Senate wording of second exemption refers to "agency's own internal personnel rules and practices."

House Section 3(a)—5 USC 552b(c) (2) (3:21–22)

House wording of second exemption follows Freedom of Information wording, namely, "relate solely to the internal personnel rules and practices of an agency."

---

*The possible compromises set forth in Part II were agreed upon en bloc by the conferees with the exception of item 12, which follows the House provision.

Possible compromise

House provision, with explanation in report that it is not intended to apply to general discussions of personnel rules, but only as necessary to protect the privacy of staff members and to cover the handling of strictly internal matters, as per Senate Gov't Op. report.

6. Senate section 4(b)(5) (4:6–7)

Senate wording applies to "information contained in investigatory records" but not to information which would be in such files if written.

House section 3(a)—5 USC 552b(c)(7) (4:6–8)

House wording applies to "investigatory records" and to "information which if written would be contained in such records."

Possible compromise

House provision, with explanation in report that non-written information is included to cover instances such as oral information imparted by a confidential informant.

7. Senate section 4(b)(5) (4:12–18)

Senate amends clause (D) as it appears in the Freedom of Information Act by dividing it into two clauses.

House section 3(a)—5 USC 552b(c)(7) (4:13–19)

House wording in clause (D) exactly follows Freedom of Information Act.

Possible compromise

House provision.

8. Senate section 4(b)(6) (4:22–5:5)

Senate applies trade secrets or financial or commercial information provision only to information which is not obtainable by subpoena or information which must be withheld "to prevent substantial injury to the competitive position of the person to whom such information relates."

House section 3(a)—5 USC 552b(c)(4) (4:22–24)

House trade secrets exemption exactly follows Freedom of Information Act.

Possible compromise

House provision, with explanation in report that it is agreed to with recognition of case law on existing trade secrets exemption of Freedom of Information Act.

9. Senate section 4(b)(7) (5:6–8)

Senate preface of prematurity provision applies to disclosing information which would lead to premature disclosure of an action or proposed action.

House section 3(a)—5 USC 552b(c)(9) (5:6–7)

House preface to prematurity exemption refers to the premature disclosure of information.

Possible compromise

House provision.

10. Senate section 4(b)(7)(A) (5:9–14)

Senate requires that disclosure *would* lead to speculation and contains twice the phrase "in currencies, securities, or commodities."

House section 3(a)—5 USC 552b(c)(9)(A) (5:9–13)

House requires that disclosure be *likely* to lead to speculation. It deletes requirement that financial speculation be "in currencies, securities, or commodities."

Possible compromise

House provision, with "in currencies, securities, or commodities" added after "financial speculation".

11. Senate section 4(b)(7)(B) (5:15–18)

Senate test is that disclosure *would* significantly frustrate implementation of agency action.

House section 3(a)—5 USC 552b(c)(9)(B) (5:15–17)

House test is that disclosure be *likely* to significantly frustrate implementation of agency action.

Possible compromise

House provision.

12. Senate section 4(b)(7)(C) (6:1–2)

Senate provision expressly exempts information on the purchase of real property.

House section 3(a)—5 USC 552b(c)(9)

No comparable provision in House.

Possible compromise

Senate provision.

13. Senate section 4(b)(9) (6:13–19)

Senate wording does not refer to subpoenas and refers only to litigation in State or Federal courts.

House section 3(a)—5 USC 552(b)(c)(10) (6:13–21)

House wording includes additional reference to discussions concerning the agency's issuance of a subpoena. Court litigation included is "civil action or proceeding", an action in a foreign court or "international tribunal", or an arbitration.

Possible compromise

House provision.

14. Senate section 4(c)(1) (7:5–14)

Senate procedures for invoking exemptions apply both to meetings and to information about meetings; refers to subdivisions.

House section 3(a)—5 USC 552(d)(1) (7:5–11)

House procedural paragraph applies only to closings of meetings. No reference to subdivisions.

Possible compromise

Senate provision, except for reference to subdivisions.

15. Senate section 4(c)(1) (7:14–16)

Senate provision for voting on a series of closings refers to "a series of meetings, a portion or portions of which are proposed to be closed to the public".

House section 3(a)—5 USC 552b(d)(1) (7:11–13)

House provision for voting on a series of closings refers to "a series of portions of meetings".

Possible compromise

Senate provision, with explanation in conference report that each portion of a meeting is to be considered as a separate entity on the issue of whether it may be closed.

16. Senate section 4(c)(1) and (3) (7:20–22; 8:4–6, 21)

Senate wording requires recorded vote only for vote on closing a series of meetings. No requirement that vote of each member be disclosed.

House section 3(a)—5 USC 552b(d)(1)–(3) (7:18; 8:3–7, 18–22)

House requires all votes on closing to be recorded and requires that disclosure of such votes must reflect vote of each member.

Possible compromise

House provisions.

17. Senate section 4(c)(3) (8:13–14)

Senate provision on closing meetings by regulation is for meetings a majority of which *will* be closed "in whole or in part".

House section 3(a)—5 USC 552b(d)(4) (8:13–14)

House provision on closing meetings by regulation is for meetings a majority of which *may* be closed.

Possible compromise

House provision.

18. Senate sections 4(c)(3), 4(d) (9:1–3, 18–20; 10:4–6)

Senate language requires that various notices regarding meetings be made public "at the earliest practicable opportunity"

House section 3(a)—5 USC 552b(d)(4), (e) (9:3–7, 17–21; 10:4–8)

House language requires that various notices regarding meetings be made public "at the earliest practicable time and in no case later than the commencement of the meeting or portion in question".

Possible compromise

Senate provisions, with explanation in report that announcements should be made as soon as possible, which should in few, if any instances be subsequent to the commencement of the meeting in question.

19. Senate section 4(d) (9:21–10:6)

Senate requires vote and public announcement when subject matter or opening/closing of a meeting is changed after the initial public announcement of the meeting.

House section 3(a)—5 USC 552(e) (9:21–10:8)

House requires vote and public announcement when time, place, subject matter, or opening/closing of a meeting is changed after initial public announcement of the meeting.

Possible compromise

Require vote only on changes of subject matter and opening/closing, but public announcement of changes in time, place, subject matter and opening/closing.

20. Senate section 4(d) (10:6–8)

Senate requires notices of meetings to be published in the Federal Register.

House section 3(a)—5 USC 552b(e)

No requirement of publication in Federal Register.

Possible compromise

Senate provision, with notation in conference report that publication in Federal Register is in addition to other available methods for public announcement of meetings.

21. Senate section 4(f) (11:18)

No comparable provision.

House section 3(a)—5 USC 552b(g) (11:18–19)

Makes right of any person to make a direct challenge to agency regulations implementing this section "subject to any limitations of time therefor provided by law".

Possible compromise

House provision, without word "therefor".

22. Senate section 4(g) (12:3–4)

Senate judicial review provision contains specific reference to declaratory judgment, injunctive relief, or other relief as may be appropriate.

House section 3(a)—5 USC 552b(h) (12:3)

House provision does not specify kinds of relief available.

Possible compromise

Senate provision.

23. Senate section 4(g) (12:12–18)

Senate requires potential plaintiff to notify agency and give it up to 10 days to remedy alleged wrong before bringing suit.

House section 3(a)—5 USC 552b(h)

No comparable requirement in House bill.

Possible compromise

House provision, with language in conference report encouraging potential plaintiffs to communicate informally with the agency prior to instituting suit.

24. Senate section 4(g) (12:21–23)

Defendant must answer complaint within 20 days after service.

House section 3(a)—5 USC 552b(h) (12:14–18)

Defendant must answer within 20 days, but court may grant up to 20 additional days upon a showing of good cause therefor.

Possible compromise

Defendant must answer complaint within 30 days after service.

25. Senate section 4(g) (13:8–10)

Senate authorizes court to disclose "the transcript or electronic recording of any portion of a meeting improperly closed to the public."

House section 3(a)—5 USC 552b(h) (13:2–5)

House authorizes court to disclose "such portion of the minutes of a meeting as is not authorized to be withheld under subsection (c) of this section".

Possible compromise

House provision (with "minutes" replaced by "transcript or electronic recording" if conferees decide upon having the latter rather than the former).

26. Senate section 4(i) (14:4–6)

Senate authorizes the court to assess costs against the plaintiff where suit was initiated for frivolous or dilatory purposes.

House section 3(a)—5 USC 552b(i) (14:1–4)

House authorizes the court to assess costs against the plaintiff where suit was initiated *primarily* for frivolous or dilatory purposes.

Possible compromise

House provision.

27. Senate section 4(j) (14:9–15)

Senate provision does not require agencies to report assessments of attorney fees against them to the Congress. Provision applies to "the agencies" subject to the section.

House section 3(a)—5 USC 552b(j) (14:9–17)

House requires agencies to include as part of their annual report to the Congress information as to assessments of attorney fees against them in court actions. Provision applies to "each agency" subject to the section.

Possible compromise

House provision.

28. Senate section 4

No comparable provision.

House section 3(a)—5 USC 552b(n) (15:9–12)

House provides that where meeting is governed by both this section and the Federal Advisory Committee Act, this section governs.

Possible compromise

Senate provision.

29. Senate section 5(a)—5 USC 557(d)(3) (16:22–17:5)

Description of materials to be placed upon the public record.

House section 4(a)—5 USC 557(d)(1)(C) (16:22–17:7)

Similar description; no substantive difference.

Possible compromise

House provision.

30. Senate section 5(a)—5 USC 557(d)(5) (17:18–24)

Provision establishes time when ex parte prohibition applies but does not specify when it *begins* to apply.

House section 4(a)—5 USC 557(d)(1)(E) (17:18–25)

House provision establishes time when prohibition *begins* to apply.

Possible compromise

House provision.

31. Senate section 6(a) (19:17–18)

Provides generally that this Act is not authority to withhold information from Congress, Provision will not be part of title 5, U.S. Code, but only a note.

House sections 3(a) and 4(a)—5 USC 552b(l), 557(d)(2) (15:1–2; 18:1–2)

Provide that neither the open meeting section nor the section prohibiting ex parte communications constitutes authority to withhold information from Congress. Same substantive effect as Senate provision, but will be included in text of title 5, U.S. Code.

Possible compromise

House provisions.

32. Senate section 6(a) (19:4–15)

Provides that the open meeting section (section 4) does not affect rights under the Freedom of Information Act, except that as to transcripts made pursuant to section 4, availability shall be governed by section 4's exemptions rather than those of the Freedom of Information Act.

House section 3(a)—5 USC 552b(k) (14:18–23)

House provision states that any request for minutes under the Freedom of Information Act shall be governed by the provisions of this Act. House provision contains other minor language differences from Senate provision.

Possible compromise

House provision, amended to clarify applicability of open meeting (rather then Freedom of Information) exemptions to minutes (or transcripts, as the case may be), and to remove first clause as redundant.

33. Senate

No comparable provision.

House section 3(a)—5 USC 552b(l) (15:2–4)

House provides that the bill "does not authorize the closing of any agency meeting or portion thereof otherwise required by law to be open".

Possible compromise

House provision.

34. Senate

No comparable provision.

House section 5(a)—39 U.S.C. 410(b)(1) (20:1–5)

Expressly makes Sunshine and Privacy legislation applicable to U.S. Postal Service.

Possible compromise

House provision.

35. Senate section 7 (21:2–6)

Makes Act effect 180 days after enactment, except that provisions requiring agencies to promulgate implementing regulations within 180 days are effective immediately.

House section 6 (21:1–7)

Same effective dates, but minor differences in wording.

Possible compromise

House provision.

36. Senate section 4(g) (13:10–15)

Provides that nothing in this section empowers a court to set aside or invalidate agency action taken or discussed at an agency meeting out of which the violation of this section arose.

House section 3(a)—5 USC 552b(h) (13:5–9)

Provides that nothing herein empowers a court to set aside, *enjoin*, or invalidate agency action, etc.

Possible compromise

House provision, with additional provision to clarify fact that prohibition applies only with respect to substantive agency action and does not bar court orders requiring agencies to comply with this section.

37. Senate section 5(a)—5 USC 557(d) (16:6, 13)

Prohibits ex parte communications *relevant* to the merits.

House section 4(a)—5 USC 557(d)(1) (16:6, 13)

Prohibits ex parte communications *relative* to the merits.

Possible compromise

Senate provision, with report language explaining that the word *relevant* is not used in the strict evidentiary sense, but is intended to apply to communications bearing on the merits or affecting the merits.

38. Senate section 5(a)—5 USC 557(d) (17:8–10)

Refers to communications made or caused to be made by a *party*.

House section 4(a)—5 USC 557(d)(1) (17:8–10)

Refers to communications made or cause to be made by a *party or interested person*.

Possible compromise

Senate provision, with report explanation that one who makes an ex parte communication while not a party, but thereafter becomes a party, is subject to sanctions as if he had been a party when the prohibited communication was made.

94TH CONGRESS 2d Session } SENATE { REPORT No. 94–1178

GOVERNMENT IN THE SUNSHINE ACT

AUGUST 27, 1976.—Ordered to be printed

Mr. CHILES, from the committee of conference, submitted the following

CONFERENCE REPORT

[To accompany S. 5]

The committee of conference on the disagreeing votes of the two Houses on the amendment of the House to the bill (S. 5) to provide that meetings of Government agencies shall be open to the public, and for other purposes, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the Senate recede from its disagreement to the amendment of the House and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the House amendment insert the following:

That this Act may be cited as the "Government in the Sunshine Act".

DECLARATION OF POLICY

SEC. 2. It is hereby declared to be the policy of the United States that the public is entitled to the fullest practicable information regarding the decisionmaking processes of the Federal Government. It is the purpose of this Act to provide the public with such information while protecting the rights of individuals and the ability of the Government to carry out its responsibilities.

OPEN MEETINGS

SEC. 3. (a) Title 5, United States Code, is amended by adding after section 552a the following new section:

"§ 552b. Open meetings

"*(a) For purposes of this section—*

"*(1) the term 'agency' means any agency, as defined in section 552 (e) of this title, headed by a collegial body composed of two or more individual members, a majority of whom are appointed to such*

position by the President with the advice and consent of the Senate, and any subdivision thereof authorized to act on behalf of the agency;

"(2) the term 'meeting' means the deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations determine or result in the joint conduct or disposition of official agency business, but does not include deliberations required or permitted by subsection (d) or (e); and

"(3) the term 'member' means an individual who belongs to a collegial body heading an agency.

(b) Members shall not jointly conduct or dispose of agency business other than in accordance with this section. Except as provided in subsection (c), every portion of every meeting of an agency shall be open to public observation.

"(c) Except in a case where the agency finds that the public interest requires otherwise, the second sentence of subsection (b) shall not apply to any portion of an agency meeting, and the requirements of subsections (d) and (e) shall not apply to any information pertaining to such meeting otherwise required by this section to be disclosed to the public, where the agency properly determines that such portion or portions of its meeting or the disclosure of such information is likely to—

"(1) disclose matters that are (A) specifically authorized under criteria established by an Executive order to be kept secret in the interests of national defense or foreign policy and (B) in fact properly classified pursuant to such Executive order;

"(2) relate solely to the internal personnel rules and practices of an agency;

"(3) disclose matters specifically exempted from disclosure by statute (other than section 552 of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

"(4) disclose trade secrets and commercial or financial information obtained from a person and privileged or confidential;

"(5) involve accusing any person of a crime, or formally censuring any person;

"(6) disclose information of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy;

"(7) disclose investigatory records compiled for law enforcement purposes, or information which if written would be contained in such records, but only to the extent that the production of such records or information would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;

"(8) disclose information contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the

use of an agency responsible for the regulation or supervision of financial institutions;

"(9) disclose information the premature disclosure of which would—

"(A) in the case of an agency which regulates currencies, securities, commodities, or financial institutions, be likely to (i) lead to significant financial speculation in currencies, securities, or commodities, or (ii) significantly endanger the stability of any financial institution; or

"(B) in the case of any agency, be likely to significantly frustrate implementation of a proposed agency action,

except that subparagraph (B) shall not apply in any instance where the agency has already disclosed to the public the content or nature of its proposed action, or where the agency is required by law to make such disclosure on its own initiative prior to taking final agency action on such proposal; or

"(10) specifically concern the agency's issuance of a subpena, or the agency's participation in a civil action or proceeding, an action in a foreign court or international tribunal, or an arbitration, or the initiation, conduct, or disposition by the agency of a particular case of formal agency adjudication pursuant to the procedures in section 554 of this title or otherwise involving a determination on the record after opportunity for a hearing.

"(d)(1) Action under subsection (c) shall be taken only when a majority of the entire membership of the agency (as defined in subsection (a)(1)) votes to take such action. A separate vote of the agency members shall be taken with respect to each agency meeting a portion or portions of which are proposed to be closed to the public pursuant to subsection (c), or with respect to any information which is proposed to be withheld under subsection (c). A single vote may be taken with respect to a series of meetings, a portion or portions of which are proposed to be closed to the public, or with respect to any information concerning such series of meetings, so long as each meeting in such series involves the same particular matters and is scheduled to be held no more than thirty days after the initial meeting in such series. The vote of each agency member participating in such vote shall be recorded and no proxies shall be allowed.

"(2) Whenever any person whose interests may be directly affected by a portion of a meeting requests that the agency close such portion to the public for any of the reasons referred to in paragraph (5), (6), or (7) of subsection (c), the agency, upon request of any one of its members, shall vote by recorded vote whether to close such meeting.

"(3) Within one day of any vote taken pursuant to paragraph (1) or (2), the agency shall make publicly available a written copy of such vote reflecting the vote of each member on the question. If a portion of a meeting is to be closed to the public, the agency shall, within one day of the vote taken pursuant to paragraph (1) or (2) of this subsection, make publicly available a full written explanation of its action closing the portion together with a list of all persons expected to attend the meeting and their affiliation.

"(4) Any agency, a majority of whose meetings may properly be closed to the public pursuant to paragraph (4), (8), (9)(A), or (10) of subsection (c), or any combination thereof, may provide by regulation for the closing of such meetings or portions thereof in the event that a majority

of the members of the agency votes by recorded vote at the beginning of such meeting, or portion thereof, to close the exempt portion or portions of the meeting, and a copy of such vote, reflecting the vote of each member on the question, is made available to the public. The provisions of paragraphs (1), (2), and (3) of this subsection and subsection (e) shall not apply to any portion of a meeting to which such regulations apply: Provided, That the agency shall, except to the extent that such information is exempt from disclosure under the provisions of subsection (c), provide the public with public announcement of the time, place, and subject matter of the meeting and of each portion thereof at the earliest practicable time.

"(e)(1) In the case of each meeting, the agency shall make public announcement, at least one week before the meeting, of the time, place, and subject matter of the meeting, whether it is to be open or closed to the public, and the name and phone number of the official designated by the agency to respond to requests for information about the meeting. Such announcement shall be made unless a majority of the members of the agency determines by a recorded vote that agency business requires that such meeting be called at an earlier date, in which case the agency shall make public announcement of the time, place, and subject matter of such meeting, and whether open or closed to the public, at the earliest practicable time.

"(2) The time or place of a meeting may be changed following the public announcement required by paragraph (1) only if the agency publicly announces such change at the earliest practicable time. The subject matter of a meeting, or the determination of the agency to open or close a meeting, or portion of a meeting, to the public, may be changed following the public announcement required by this subsection only if (A) a majority of the entire membership of the agency determines by a recorded vote that agency business so requires and that no earlier announcement of the change was possible, and (B) the agency publicly announces such change and the vote of each member upon such change at the earliest practicable time.

"(3) Immediately following each public announcement required by this subsection, notice of the time, place, and subject matter of a meeting, whether the meeting is open or closed, any change in one of the preceding, and the name and phone number of the official designated by the agency to respond to requests for information about the meeting, shall also be submitted for publication in the Federal Register.

"(f)(1) For every meeting closed pursuant to paragraphs (1) through (10) of subsection (c), the General Counsel or chief legal officer of the agency shall publicly certify that, in his or her opinion, the meeting may be closed to the public and shall state each relevant exemptive provision. A copy of such certification, together with a statement from the presiding officer of the meeting setting forth the time and place of the meeting, and the persons present, shall be retained by the agency. The agency shall maintain a complete transcript or electronic recording adequate to record fully the proceedings of each meeting, or portion of a meeting, closed to the public, except that in the case of a meeting, or portion of a meeting, closed to the public pursuant to paragraph (8), (9)(A), or (10) of subsection (c), the agency shall maintain either such a transcript or recording, or a set of minutes. Such minutes shall fully and clearly describe all matters discussed and shall provide a full and accurate summary of any actions taken, and the reasons therefor, including a description of each of the views expressed on any item and the record of any rollcall vote (reflecting the vote of each member on the question). All documents considered in connection with any action shall be identified in such minutes.

"(2) *The agency shall make promptly available to the public, in a place easily accessible to the public, the transcript, electronic recording, or minutes (as required by paragraph (1)) of the discussion of any item on the agenda, or of any item of the testimony of any witness received at the meeting, except for such item or items of such discussion or testimony as the agency determines to contain information which may be withheld under subsection (c). Copies of such transcript, or minutes, or a transcription of such recording disclosing the identity of each speaker, shall be furnished to any person at the actual cost of duplication or transcription. The agency shall maintain a complete verbatim copy of the transcript, a complete copy of the minutes, or a complete electronic recording of each meeting, or portion of a meeting, closed to the public, for a period of at least two years after such meeting, or until one year after the conclusion of any agency proceeding with respect to which the meeting or portion was held, whichever occurs later.*

"(g) *Each agency subject to the requirements of this section shall, within 180 days after the date of enactment of this section, following consultation with the Office of the Chairman of the Administrative Conference of the United States and published notice in the Federal Register of at least thirty days and opportunity for written comment by any persons promulgate regulations to implement the requirements of subsections (b) through (f) of this section. Any person may bring a proceeding in the United States District Court for the District of Columbia to require an agency to promulgate such regulations if such agency has not promulgated such regulations within the time period specified herein. Subject to any limitations of time provided by law, any person may bring a proceeding in the United States Court of Appeals for the District of Columbia to set aside agency regulations issued pursuant to this subsection that are not in accord with the requirements of subsections (b) through (f) of this section and to require the promulgation of regulations that are in accord with such subsections.*

"(h)(1) *The district courts of the United States shall have jurisdiction to enforce the requirements of subsections (b) through (f) of this section by declaratory judgment, injunctive relief, or other relief as may be appropriate. Such actions may be brought by any person against an agency prior to, or within sixty days after, the meeting out of which the violation of this section arises, except that if public announcement of such meeting is not initially provided by the agency in accordance with the requirements of this section, such action may be instituted pursuant to this section at any time prior to sixty days after any public announcement of such meeting. Such actions may be brought in the district court of the United States for the district in which the agency meeting is held or in which the agency in question has its headquarters, or in the District Court for the District of Columbia. In such actions a defendant shall serve his answer within thirty days after the service of the complaint. The burden is on the defendant to sustain his action. In deciding such cases the court may examine in camera any portion of the transcript, electronic recording, or minutes of a meeting closed to the public, and may take such additional evidence as it deems necessary. The court, having due regard for orderly administration and the public interest, as well as the interests of the parties, may grant such equitable relief as it deems appropriate, including granting an injunction against future violations of this section or ordering the agency to make available to the public such portion of the transcript, recording, or minutes of a meeting as is not authorized to be withheld under subsection (c) of this section.*

"(2) Any Federal court otherwise authorized by law to review agency action may, at the application of any person properly participating in the proceeding pursuant to other applicable law, inquire into violations by the agency of the requirements of this section and afford such relief as it deems appropriate. Nothing in this section authorizes any Federal court having jurisdiction solely on the basis of paragraph (1) to set aside, enjoin, or invalidate any agency action (other than an action to close a meeting or to withhold information under this section) taken or discussed at an agency meeting out of which the violation of this section arose.

"(i) The court may assess against any party reasonable attorney fees and other litigation costs reasonably incurred by any other party who substantially prevails in any action brought in accordance with the provisions of subsection (g) or (h) of this section, except that costs may be assessed against the plaintiff only where the court finds that the suit was initiated by the plaintiff primarily for frivolous or dilatory purposes. In the case of assessment of costs against an agency, the costs may be assessed by the court against the United States.

"(j) Each agency subject to the requirements of this section shall annually report to Congress regarding its compliance with such requirements, including a tabulation of the total number of agency meetings open to the public, the total number of meetings closed to the public, the reasons for closing such meetings, and a description of any litigation brought against the agency under this section, including any costs assessed against the agency in such litigation (whether or not paid by the agency).

"(k) Nothing herein expands or limits the present rights of any person under section 552 of this title, except that the exemptions set forth in subsection (c) of this section shall govern in the case of any request made pursuant to section 552 to copy or inspect the transcripts, recordings, or minutes described in subsection (f) of this section. The requirements of chapter 33 of title 44, United States Code, shall not apply to the transcripts, recordings, and minutes described in subsection (f) of this section.

"(l) This section does not constitute authority to withhold any information from Congress, and does not authorize the closing of any agency meeting or portion thereof required by any other provision of law to be open.

"(m) Nothing in this section authorizes any agency to withhold from any individual any record, including transcripts, recordings, or minutes required by this section, which is otherwise accessible to such individual under section 552a of this title.".

(b) The chapter analysis of chapter 5 of title 5, United States Code, is amended by inserting:

"552b. Open meetings."

immediately below:

"552a. Records about individuals.".

EX PARTE COMMUNICATIONS

Sec. 4. (a) Section 557 of title 5, United States Code, is amended by adding at the end thereof the following new subsection:

"(d)(1) In any agency proceeding which is subject to subsection (a) of this section, except to the extent required for the disposition of ex parte matters as authorized by law—

"(A) no interested person outside the agency shall make or knowingly cause to be made to any member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, an ex parte communication relevant to the merits of the proceeding;

"(B) no member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, shall make or knowingly cause to be made to any interested person outside the agency an ex parte communication relevant to the merits of the proceeding;

"(C) a member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of such proceeding who receives, or who makes or knowingly causes to be made, a communication prohibited by this subsection shall place on the public record of the proceeding:

"(i) all such written communications;

"(ii) memoranda stating the substance of all such oral communications; and

"(iii) all written responses, and memoranda stating the substance of all oral responses, to the materials described in clauses (i) and (ii) of this subparagraph;

"(D) upon receipt of a communication knowingly made or knowingly caused to be made by a party in violation of this subsection, the agency, administrative law judge, or other employee presiding at the hearing may, to the extent consistent with the interests of justice and the policy of the underlying statutes, require the party to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation; and

"(E) the prohibitions of this subsection shall apply beginning at such time as the agency may designate, but in no case shall they begin to apply later than the time at which a proceeding is noticed for hearing unless the person responsible for the communication has knowledge that it will be noticed, in which case the prohibitions shall apply beginning at the time of his acquisition of such knowledge.

"(2) This subsection does not constitute authority to withhold information from Congress.".

(b) Section 551 of title 5, United States Code, is amended—

(1) by striking out "and" at the end of paragraph (12);

(2) by striking out the "act." at the end of paragraph (13) and inserting in lieu thereof "act; and"; and

(3) by adding at the end thereof the following new paragraph:

"(14) 'ex parte communication' means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports on any matter or proceeding covered by this subchapter.".

(c) Section 556(d) of title 5, United States Code, is amended by inserting between the third and fourth sentences thereof the following new sentence: "The agency may, to the extent consistent with the interests of justice and the policy of the underlying statutes administered by the agency, consider

a violation of section 557(d) of this title sufficient grounds for a decision adverse to a party who has knowingly committed such violation or knowingly caused such violation to occur.".

CONFORMING AMENDMENTS

SEC. 5. (a) Section 410(b)(1) of title 39, United States Code, is amended by inserting after "Section 552 (public information)," the words "section 552a (records about individuals), section 552b (open meetings),".

(b) Section 552(b)(3) of title 5, United States Code, is amended to read as follows:

> *"(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;".*

(c) Subsection (d) of section 10 of the Federal Advisory Committee Act is amended by striking out the first sentence and inserting in lieu thereof the following: "Subsections (a)(1) and (a)(3) of this section shall not apply to any portion of an advisory committee meeting where the President, or the head of the agency to which the advisory committee reports, determines that such portion of such meeting may be closed to the public in accordance with subsection (c) of section 552b of title 5, United States Code.".

EFFECTIVE DATE

SEC. 6. (a) Except as provided in subsection (b) of this section, the provisions of this Act shall take effect 180 days after the date of its enactment.

(b) Subsection (g) of section 552b of title 5, United States Code as, added by section 3(a) of this Act, shall take effect upon enactment.

And the House agree to the same.

ABE RIBICOFF,
EDMUND S. MUSKIE,
LEE METCALF,
LAWTON CHILES,
C. H. PERCY,
J. JAVITS,
W. V. ROTH, Jr.,
Managers on the Part of the Senate.

JACK BROOKS,
JOHN E. MOSS,
DANTE B. FASCELL,
JOHN CONYERS,
BELLA S. ABZUG,
WALTER FLOWERS,
GEORGE E. DANIELSON,
BARBARA JORDAN,
R. L. MAZZOLI,
EDWARD W. PATTERSON,
FRANK HORTON,
PAUL N. MCCLOSKEY, Jr.,
CARLOS J. MOORHEAD,
THOMAS N. KINDNESS,
Managers on the Part of the House.

JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE

The managers on the part of the House and the Senate at the conference on the disagreeing votes of the two Houses on the amendment of the House to the bill (S. 5) to provide that meetings of Government agencies shall be open to the public, and for other purposes, submit the following joint statement to the House and the Senate in explanation of the effect of the action agreed upon by the managers and recommended in the accompanying conference report:

The House amendment to the text of the bill struck out all of the Senate bill after the enacting clause and inserted a substitute text.

The Senate recedes from its disagreement to the amendment of the House with an amendment which is a complete substitute for the House amendment, and the House agrees to the same. The differences among the Senate bill, the House amendment, and the substitute agreed to in conference are noted below, except for clerical corrections, conforming changes made necessary by agreements reached by the conferees, and minor drafting and clarifying changes.

SHORT TITLE

The Senate bill, the House amendment, and the conference substitute provide that this legislation may be cited as the "Government in the Sunshine Act".

DECLARATION OF POLICY

The Senate bill, the House amendment, and the conference substitute provide in section 2 that it is the policy of the United States that the public is entitled to the fullest practicable information regarding the decisionmaking processes of the Federal Government, and that it is the purpose of this Act to provide the public with such information while protecting the rights of individuals and the ability of the Government to carry out its responsibilities.

Open Meetings

CODIFICATION

Senate bill

The Senate bill did not make its open meeting provisions a part of title 5, United States Code.

House amendment

The House amendment enacted its open meeting provisions as a new section 552b of title 5, United States Code.

Conference substitute

The conference substitute is the same as the House amendment.

DEFINITIONS

Senate bill

Section 3 of the Senate bill defined the term "person" to include an individual partnership, corporation, association, or public or private organization other than an agency.

Section 4(a) of the Senate bill made section 4 applicable to the Federal Election Commission and to any agency, as defined in section 551(1) of title 5, United States Code, where the collegial body comprising the agency consists of two or more individual members, at least a majority of whom are appointed to such position by the President with the advice and consent of the Senate.

Section 4(a) of the Senate bill also provided that for purposes of section 4, a meeting means the deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations concern the joint conduct or disposition of official agency business.

The Senate bill did not contain a definition of the term "member".

House amendment

The House amendment, subsection (a) of the proposed new section 552b of title 5, United States Code, contained no definition of the term "person", since the proposed section 552b would automatically be subject to the definition of "person" continued in 5 U.S.C. 551(2) (which is identical to the definition contained in the Senate bill).

The House amendment defined the term "agency" as the Federal Election Commission and any agency, as defined in section 552(e) of title 5, United States Code, headed by a collegial body composed of two or more individuals, a majority of whom are appointed to such position by the President with the advice and consent of the Senate, including any subdivision thereof authorized to act on behalf of the agency.

The House amendment defined the term "meeting' as a gathering to jointly conduct or dispose of agency business by two or more, but at least the number of individual agency members required to take action on behalf of the agency, but not including gatherings held to take action required or permitted by subsection (d) of section 552b.

The House amendment defined the term "member" as an individual who belongs to a collegial body heading an agency.

Conference substitute

The conference substitute is subsection (a) of new section 552b. It is the same as the House amendment, except as follows:

1. The separate reference to the Federal Election Commission in the definition of "agency" is eliminated, since that body now falls within the bill's generic definition of the term uuder the provisions of Public Law 94–283.

2. Although the language of the House amendment referring to a covered agency as "headed by a collegial body" is used in the substitute instead of the reference in the Senate bill to "the collegial body comprising the agency", the intent and understanding of the conferees regarding this provision is that meetings of a collegial body governing an agency whose day-to-day management may be under the authority of a single individual (such as the United States Postal Service and the National

Railroad Passenger Corporation (Amtrak)) are included within the definition of agency.

3. The substitute defines the term "meeting" as the deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations determine or result in the joint conduct or disposition of agency business, but not including deliberations to take action to open or close a meeting, or to release or withhold information under subsection (d) or (e) of this section. This is the Senate definition, as explained in the Senate report, except that the word "concern" is replaced by the words "determine or result in". This definition will include conference telephone calls if they involve the requisite number of members and otherwise come within the definition.

PROHIBITION ON CONDUCT OF BUSINESS OTHER THAN AS PROVIDED IN THIS SECTION

Senate bill

The Senate bill contained no express prohibition on the conduct of agency business other than as provided in the bill.

House amendment

Section (b)(1) of new section 552b, as included in the House amendment, provided that members, as described in subsection (a)(2), shall not jointly conduct or dispose of agency business without complying with subsections (b) through (g).

Conference substitute

The conference substitute provides that members shall not jointly conduct or dispose of agency business in a meeting other than in accordance with new section 552b. This prohibition does not prevent agency members from considering individually business that is circulated to them sequentially in writing.

OPEN MEETING REQUIREMENT

Senate bill

Subsection 4(a) of the Senate bill provided that, except as provided in subsection 4(b), all meetings of a collegial body comprising an agency, or of a subdivision thereof authorized to take action on behalf of the agency, shall be open to the public.

House amendment

The House amendment provided, in subsection (b)(2) of new section 552b, that except as provided in subsection (c), every portion of every meeting of an agency (including a subdivision) shall be open to public observation.

Conference substitute

The conference substitute is the same as the House amendment. The phrase "open to public observation" is intended to guarantee that ample space, sufficient visibility, and adequate acoustics will be provided.

EXEMPTIONS FROM OPEN MEETING REQUIREMENT

Senate bill

Section 4(b) of the Senate bill provided that, except where the agency finds that the public interest requires otherwise, (1) the open meeting requirement of subsection 4(a) shall not apply to any meeting, or portion thereof, of an agency or a subdivision of an agency authorized to take action on behalf of the agency, and (2) the informational and disclosure requirements of subsections 4 (c) and (d) shall not apply to any information pertaining to such meeting otherwise required by this section to be disclosed to the public, where the agency or subdivision in question properly determines that such portion or portions of the meeting, or such information, can be reasonably expected to—

(1) disclose matters (A) specifically authorized under criteria by an Executive order to be kept secret in the interests of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) relate solely to the agency's own internal personnel rules and practices;

(3) disclose information of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy;

(4) involve accusing any person of a crime, or formally censuring any person;

(5) disclose information contained in investigatory records compiled for law enforcement purposes, but only to the extent that the disclosure would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source, (E) in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation disclose confidential information furnished only by the confidential source, (F) disclose investigative techniques and procedures, or (G) endanger the life or physical safety of law enforcement personnel;

(6) disclose trade secrets, or financial or commercial information obtained from any person, where such trade secrets or other information could not be obtained by the agency without a pledge of confidentiality, or where such information must be withheld from the public in order to prevent substantial injury to the competitive position of the person to whom such information relates;

(7) disclose information which must be withheld from the public in order to avoid premature disclosure of an action or a proposed action by—

(A) an agency which regulates currencies, securities, commodities, or financial institutions where such disclosure would (i) lead to significant financial speculation in currencies, securities, or commodities, or (ii) significantly endanger the stability of any financial institution;

(B) any agency where such disclosure would significantly frustrate implementation of the proposed agency action, or private action contingent thereon; or

(C) any agency relating to the purchase by such agency of real property.

This exemption would not apply in any instance where the agency has already disclosed to the public the content or nature of its proposed action, or where the agency is required by law to make such disclosure on its own initiative prior to taking final agency action on such proposal;

(8) disclose information contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions;

(9) specifically concern the agency's participation in a civil action in Federal or State court, or the initiation, conduct, or disposition by the agency of a particular case of formal agency adjudication pursuant to the procedures in section 554 of title 5, United States Code, or otherwise involving a determination on the record after opportunity for a hearing; or

(10) disclose information required to be withheld from the public by any other statute establishing particular criteria or referring to particular types of information.

House amendment

Subsection (c) of 5 U.S.C. 552b, as included in the House amendment, provided that except in a case where the agency finds that the public interest requires otherwise, the open meeting requirement of subsection (b) shall not apply to any portion of an agency meeting, and the informational and disclosure requirements of subsections (d) and (e) shall not apply to any information pertaining to such meeting otherwise required by this section to be disclosed to the public, where the agency properly determines that such portion or portions of its meeting or the disclosure of such information is likely to—

(1) disclose matters that are (A) specifically authorized under criteria established by an Executive order to be kept secret in the interests of national defense or foreign policy and (B) in fact properly classified pursuant to such Executive order;

(2) relate solely to the internal personnel rules and practices of an agency;

(3) disclose matters specifically exempted from disclosure by statute (other than section 552 of title 5, United States Code), provided that such statute (A) requires that the matters be withheld from the public, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) disclose trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) involve accusing any person of a crime, or formally censuring any person;

(6) disclose information of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy;

(7) disclose investigatory records compiled for law enforcement purposes, or information which if written would be contained in such records, but only to the extent that the production of such records or information would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;

(8) disclose information contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions;

(9) disclose information the premature disclosure of which would—

(A) in the case of an agency which regulates currencies, securities, commodities, or financial institutions, be likely to (i) lead to significant financial speculation, or (ii) significantly endanger the stability of any financial institution; or

(B) in the case of any agency, be likely to significantly frustrate implementation of a proposed agency action, except that exemption (9)(B) would not apply in any instance after the content or nature of the proposed agency action has been disclosed to the public by the agency, unless the agency is required by law to make such disclosure prior to taking final agency action on such proposal or after the agency publishes or serves a substantive rule pursuant to section 553(d) of title 5, United States Code; or

(10) specifically concern the agency's issuance of a subpena, or the agency's participation in a civil action or proceeding, an action in a foreign court or international tribunal, or an arbitration, or the initiation, conduct, or disposition by the agency of a particular case of formal agency adjudication pursuant to the procedures in section 554 of title 5, United States Code, or otherwise involving a determination on the record after opportunity for a hearing.

Conference substitute

The conference substitute is the same as the House amendment, except that the third exemption, incorporating by reference exemptions contained in other statutes, applies only to statutes that either (a) require that the information be withheld from the public in such a manner as to leave no discretion on the issue, or (b) establish particular criteria for withholding or refer to particular types of information to be withheld. The conferees intend this language to overrule the decision of the Supreme Court in *Administrator, FAA* v. *Robertson*, 422 U.S. 255 (1975), which dealt with section 1104 of the Federal Aviation Act of 1958 (49 U.S.C. 1504). Another example of a statute whose terms do not bring it within this exemption is section 1106 of the Social Security Act (42 U.S.C. 1306).

The conferees' understanding and intention with respect to subsection (c) is as follows:

1. The conferees understand the word "likely" to mean that it is more likely than not that the event or result in question will occur.

2. The conferees intend the inclusion in the seventh exemption (law enforcement material) of non-written information, such as oral information imparted by a confidential informant, to cover only information that if written would be included in investigatory records compiled for law enforcement purposes.

3. The language of the House amendment regarding trade secrets and confidential financial or commercial information is identical to the analogous exemption in the Freedom of Information Act, 5 U.S.C. 522(b)(4), and the conferees have agreed to this language with recognition of judicial interpretations of that exemption.

4. The limitation on the second part of the ninth exemption (information whose disclosure would significantly frustrate a proposed agency action) provides that it shall not apply in any instance where the agency has already disclosed to the public the content or nature of its proposed action, or where the agency is required by law to make such disclosure on its own initiative prior to taking final agency action on the proposal. Disclosure of the information other than by the agency, such as by an unauthorized "leak", would not render it ineligible for the protection of this exemption.

5. In an appropriate instance, an agency discussion of the possible purchase of real property would fall within the second part of the ninth exemption.

6. The House version of the personnel exemption is agreed to with recognition of the Supreme Court's interpretation of the analogous Freedom of Information Act exemption in *Department of the Air Force* v. *Rose*, — *U.S.* —, 44 U.S.L.W. 4503. (April 21, 1976).

PROCEDURE FOR CLOSING MEETINGS

Senate bill

Subsection 4(c)(1) of the Senate bill provided that action to close a meeting or to withhold information under subsection 4(b) shall be taken only when a majority of the entire membership of the agency or subdivision concerned votes to take such action. A separate vote is to be taken with respect to each meeting (or portion thereof) proposed to be closed, or any information proposed to be withheld, except that a single vote may be taken with respect to a series of meetings, a portion or portions of which are proposed to be closed to the public, or with respect to any information concerning such series of meetings, if each meeting in the series involves the same particular matters and is scheduled to be held no more than 30 days after the initial meeting in the series.

The vote of each agency member is to be recorded and proxies are not permitted.

Whenever any person whose interests might be directly affected by a meeting requests that the agency close a portion or portions of the meeting under the exemptions relating to personal privacy,

criminal accusation, or law enforcement information, the agency, upon the request of any one of its members, is required to vote whether to close such meeting.

Within one day of any vote taken pursuant to this paragraph, the agency is required to make public a written copy of the vote.

Subsection 4(c)(2) of the Senate bill provided that if a meeting (or portion thereof) is closed, the agency must, within one day of the vote taken under paragraph (c)(1), make public a full written explanation of its action closing the meeting, together with a list containing the names and affiliations of all persons expected to attend the meeting.

Subsection 4(c)(3) of the Senate bill provided a special procedure whereby any agency, a majority of whose meetings will properly be closed to the public pursuant to the exemptions for trade secrets, information that might lead to financial speculation, bank condition reports, or adjudicatory proceedings or civil actions, may provide by regulation for the closing of such meetings or portions, so long as a majority of the members of the agency vote at the beginning of the meeting or portion to close the meeting and a copy of the vote is made public.

The closing procedures of paragraphs (c)(1) and (2), and the announcement procedures of subsection (d), do not apply to any meeting closed under these regulations, but the agency is required to make a public announcement of the date, place, and subject matter of the meeting at the earliest practicable opportunity (except to the extent that to do so would disclose information exempt under subsection 4(b)).

House amendment

Subsection (d)(1) of new section 552b, as set forth in the House amendment, provided that action to close a meeting (or portion thereof) may be taken only when a majority of the entire membership of the agency votes to take such action. A separate vote of the agency members is to be taken with respect to each meeting a portion or portions of which are proposed to be closed, except that a single vote may be taken with respect to a series of portions of meetings proposed to be closed if each portion in such series involves the same particular matters and is scheduled to be held no more than 30 days after the initial portion of a meeting in the series.

The vote of each agency member is required to be recorded and proxies are not permitted.

Subsection (d)(2) of section 552b provided that whenever any person whose interests might be directly affected by a portion of a meeting requests that the agency close such portion to the public under the exemptions relating to personal privacy, criminal accusation, or law enforcement information, the agency, upon the request of any one of its members, is required to vote by recorded vote whether to close such meeting.

Subsection (d)(3) of section 552b required the agency to make public a written copy of any vote taken pursuant to paragraphs (d)(1) or (2), reflecting the vote of each member on the question, within one day after the vote. If the vote is to close the meeting (or a portion thereof), the agency is also required to make public within one day a full written explanation of its action closing the portion and a list of the names and affiliations of all persons expected to attend the meeting.

Subsection (d)(4) of section 552b provided a special procedure whereby any agency, a majority of whose meetings may properly be closed pursuant to the exemptions for trade secrets, information that might lead to financial speculation, bank condition reports, or adjudicatory proceedings or civil actions, may provide by regulation for the closing of such meetings or portions in the event that a majority of the members of the agency vote by recorded vote at the beginning of the meeting or portion to close the exempt portions thereof and a copy of the vote, reflecting the vote of each member on the question, is made public.

The closing procedures of paragraphs (d)(1), (2) and (3), and the announcement procedures of subsection (e), do not apply to any portion of a meeting closed under these regulations, but the agency is required to make a public announcement of the date, place, and subject matter of the meeting (and each portion thereof) at the earliest practicable time and in no case later than the commencement of the meeting or portion (except to the extent that to do so would disclose information exempt under subsection (d)).

Conference substitute

The conference substitute is the same as the Senate bill, except as follows:

1. The reference to an agency subdivision in paragraph (1) is eliminated, since the definition of "agency" in subparagraph (a)(1) of section 552b includes any subdivision thereof authorized to act on behalf of the agency. The reference to the definition of "agency" in this instance is intended to make clear that when a subdivision is authorized to act on behalf of the agency, a majority of the entire membership of the subdivision is necessary to close a meeting.
2. Any vote to close a meeting upon the request of an affected person, or using the special procedure under paragraph (d)(4), must be recorded. When such vote is published, the vote of each individual member shall be set forth.
3. While the public announcement required when a meeting is closed using the special procedure under paragraph (d)(4) need only be made at the earliest practicable time, the conferees intend that such announcements be made as soon as possible, which should in few, if any, instances be later than the commencement of the meeting or portion in question.
4. The fact that one portion of a meeting may be closed does not justify the closing of any other portion.

ANNOUNCEMENT OF MEETINGS

Senate bill

Section 4(d) of the Senate bill required that the agency publicly announce, at least one week before a meeting, the following:

1. the date of the meeting;
2. the place of the meeting;
3. the subject matter of the meeting;
4. whether the meeting is open or closed to the public; and
5. the name and telephone number of the official designated by the agency to respond to requests for information about the meeting.

This seven day period may be reduced if the majority of the members of the agency or subdivision determine by vote that the agency business so requires, in which case public announcement of the date, place, and subject matter of the meeting, and whether it is open or closed, is to be made at the earliest practicable opportunity.

The subject matter or closed/open determination for a meeting may be changed following the initial public announcement if (1) a majority of the entire membership of the agency or subdivision determines by vote that the agency business so requires and that no earlier announcement of the change was possible, and (2) the change is announced at the earliest practicable opportunity.

Notice of any public announcement required by this subsection is to be submitted for publication in the Federal Register immediately after its release.

House amendment

Subsection (e) of new section 552b, as added by the House amendment, required that the agency publicly announce, at least one week before a meeting, the following:

1. the date of the meeting;
2. the place of the meeting;
3. the subject matter of the meeting;
4. whether the meeting is to be open or closed to the public; and
5. the name and telephone number of the official designated by the agency to respond to requests for information about the meeting.

This seven day period may be reduced if the majority of the members of the agency determines by recorded vote that the agency business so requires, in which case public announcement of the date, place, and subject matter of the meeting, and whether it was open or closed to the public, is to be made at the earliest practicable time and in no case later than the commencement of the meeting or portion in question.

The time, place, or subject matter of a meeting, or the determination whether a meeting should be open or closed, may be changed following the initial public announcement if (1) a majority of the entire membership of the agency determines by recorded vote that the agency business so requires and that no earlier announcement of the change was possible, and (2) the change and the vote of each member thereon is announced at the earliest practicable time and in no case later than the commencement of the meeting or portion in question.

Conference substitute

The conference substitute is the same as the House amendment, except as follows:

1. While the public announcement required when a meeting is announced on less than seven days' notice, or when the time, place or subject matter of a meeting, or the determination whether to open or close a meeting is changed following the initial public announcement, need only be made at the earliest practicable time, the conferees intend that such announcements be made as soon as possible, which should in few, if any, instances be later than the commencement of the meeting or portion in question.
2. A change in the time or place of a meeting made subsequent to the initial announcement need not be voted upon by the agency members, but must be announced at the earliest practicable time.

3. The bill requires that reasonable means be used to assure that the public is fully informed of public announcements pursuant to this section. Such means include posting notices on the agency's public notice boards, publishing them in publications whose readers may have an interest in the agency's, operations, and sending them to the persons on the agency's general mailing list or a mailing list maintained for those who desire to receive such material.

Notice of a public announcement pursuant to this subsection must also be submitted immediately for publication in the Federal Register.

TRANSCRIPTS, RECORDINGS, AND MINUTES OF MEETINGS

Senate bill

Section 4(e) of the Senate bill required that a verbatim transcript or electronic recording be made of each meeting or portion closed to the public, except for a meeting or portion closed under the exemption for adjudicatory proceedings and civil actions. The transcript or recording of each item on the agenda is to be made available to the public promptly, in a place easily accessible to the public, where no significant portion of such item contains any information falling within one of the the exemptions in section 4(b).

Copies of the transcript (or a transcription of the recording disclosing the identity of each speaker) are to be furnished to any person at the actual cost of duplication or transcription.

The complete transcript or recording is to be maintained by the agency for at least two years after the meeting or one year after the conclusion of the agency proceeding which was the subject of the meeting, whichever occurred later.

House amendment

Subsection (f)(1) of new section 552b, as contained in the House amendment, required that for every meeting closed under the section, the General Counsel or chief legal officer of the agency certify that, in his opinion, the meeting may properly be closed and state the relevant exemptive provision. A copy of such certification, together with a statement from the presiding officer of the meeting setting forth the date, time, and place of the meeting, the persons present, the generic subject matter of the discussion at the meeting, and the actions taken, is to be incorporated into minutes retained by the agency.

Subsection (f)(2) of section 552b required that written minutes be kept of any meeting or portion which is open and promptly be made available to the public in a location easily accessible to the public. The minutes are to be maintained for a period of at least two years after the meeting, and copies are to be furnished to any person at no greater than the actual cost of duplication (or, if in the public interest, at no cost).

Conference substitute

Subsection (f)(1) of the conference substitute requires that before a meeting may be closed, the General Counsel or chief legal officer of the agency must certify that, in his or her opinion, the meeting may properly be closed and state each relevant exemptive provision. A copy

80-459 O - 77 - 52

of such certification, together with a statement from the presiding officer of the meeting setting forth the date, time, and place of the meeting, and the persons present, shall be retained by the agency as part of the transcript, recording, or minutes of the meeting.

The agency shall make a verbatim transcript or electronic recording of each meeting or portion closed to the public, except that for a meeting closed under exemptions (8) (bank reports), (9)(A) (information likely to lead to financial speculation), and (10) (adjudicatory proceedings or civil actions), the agency may elect to make either a transcript, a recording, or minutes. If minutes are kept, they must fully and clearly describe all matters discussed, provide a full and accurate summary of any actions taken and the reasons expressed therefor, and include a description of each of the views expressed on any item. The minutes must also reflect the vote of each member on any roll call vote taken during the proceedings and must identify all documents considered at the meeting.

Subsection (f)(2) of the conference substitute requires that the transcript, recording, or minutes made pursuant to paragraph (f)(1) as to each item on the agenda must be made promptly available to the public, except for agenda items or items of the discussion or testimony that the agency determines to contain information exempt under subsection (c).

Copies of the nonexempt portions of the transcript, or minutes, or a transcription of the recording disclosing the identity of each speaker, must be furnished to any person at the actual cost of duplication or transcription.

The complete transcript, minutes, or recording of a closed meeting is to be maintained by the agency for at least two years after the meeting or one year after the conclusion of the agency proceeding which was the subject of the meeting, whichever occurs later.

AGENCY REGULATIONS

Senate bill

Section 4(f) of the Senate bill required each agency subject to the requirements of section 4 to promulgate implementing regulations within 180 days after the enactment of the Act, following consultation with the Office of the Chairman of the Administrative Conference of the United States, published notice in the Federal Register of at least 30 days and opportunity for any person to make written comment thereon.

The Senate provision permitted any person to bring a proceeding in the United States District Court for the District of Columbia to require the promulgation of such regulations if not promulgated within the 180-day period, and also permitted any person to bring a proceeding in the United States Court of Appeals for the District of Columbia Circuit to set aside any such regulations not in accord with the requirements of subsections (a) through (e) of section 4 and to require the promulgation of regulations in accord with those provisions.

House amendment

The House amendment, subsection (g) of new section 552b, was the same as the Senate bill, except that the right to bring a proceeding in the Court of Appeals to challenge agency regulations promulgated

under the Act is subject to "any limitations of time therefor provided by law."

Conference substitute

The conference substitute is the same as the House amendment, except that the right to bring a proceeding in the Court of Appeals to challenge agency regulations promulgated under the Act is subject to "any limitations of time provided by law."

JUDICIAL REVIEW

Senate bill

Section 4(g) of the Senate bill vested in the United States District Courts jurisdiction to enforce subsections (a) through (e) of section 4 by declaratory judgment, injunctive relief, or other appropriate relief. An action may be brought by any person prior to, or within 60 days after the meeting in question, except that if proper public announcement of the meeting is not made, the action may be instituted at any time within 60 days after such announcement is made.

The Senate provision required a potential plaintiff to notify the agency before instituting suit and to allow it a reasonable period of time (not to exceed 10 days or, if notification is made prior to the meeting, not to exceed two days) to correct the violation.

An action may be brought where the plaintiff resides or has his principal place of business, or where the agency has its headquarters. The defendant is required to serve his answer within 20 days after the service of the complaint, and the burden is on the defendant to sustain his action.

In deciding such an action the court may examine in camera any portion of the transcript or recording of a closed meeting and may take any additional evidence it deems necessary. The court, having due regard for orderly administration, the public interest, and the interests of the party, may grant such equitable relief as it deems appropriate, including enjoining future violations or ordering the agency to make public the transcript or recording of any portion of a meeting improperly closed to the public.

Subsection 4(g) provided that, except as provided in subsection 4(h), nothing in section 4 confers jurisdiction upon any district court to set aside or invalidate any agency action taken or discussed at a meeting out of which a violation of this section arose.

Subsection 4(h) of the Senate bill provided that any Federal court otherwise authorized by law to review agency action may, at the request of any person properly participating in such a review proceeding, inquire into violations of section 4 by the agency and afford any such relief as it deems appropriate.

House amendment

In the House amendment, subsection (h) of new section 552b vested in the United States District Courts jurisdiction to enforce subsections (b) through (f) of section 552b. An action may be brought by any person prior to, or within 60 days after the meeting in question, except that if proper public announcement of the meeting is not made, the action may be instituted at any time within 60 days after such announcement is made.

The House amendment permitted an action to be brought where the meeting was held, where the agency has its headquarters, or in the District of Columbia. The defendant is required to serve his answer within 20 days after the service of the complaint, but the court may extend that time limit for up to 20 additional days upon a showing of good cause for an extension. The burden is on the defendant to sustain his action.

In deciding such an action the court may examine in camera any portion of the minutes of a closed meeting and may take any additional evidence it deemed necessary. The court, having due regard for orderly administration, the public interest, and the interests of the party, may grant such equitable relief as it deems appropriate, including enjoining future violations or ordering the agency to make public such portion of the minutes as was not exempt under subsection (c) of section 552b.

Subsection (h) further provided that nothing in section 552b confers jurisdiction on a district court acting solely under subsection (h) to set aside, enjoin, or invalidate any agency action taken or discussed at a meeting out of which a violation of section 552b arose.

Conference substitute

The conference substitute vests in the United States District Courts jurisdiction to enforce subsections (b) through (f) of section 552b by declaratory judgment, injunctive relief, or other relief as may be appropriate. An action may be brought by any person prior to, or within 60 days after the meeting in question, except that if proper public announcement of the meeting is not made, the action may be instituted at any time within 60 days after such announcement is made.

The conference substitute does not contain the requirement of the Senate bill that a potential plaintiff formally notify the agency before commencing an action under this subsection because the conferees expect and encourage potential plaintiffs or their attorneys to communicate informally with the agency before bringing suit.

An action under subsection (h)(1) may be brought where the agency meeting was or is to be held, where the agency has its headquarters, or in the District of Columbia. The defendant must serve his answer within 30 days after the service of the complaint, and the court is not given discretion by the substitute to extend that time limit. The burden is upon the defendant to substain his action.

In deciding such an action the court may examine in camera any portion of the transcript, recording, or minutes of a closed meeting and may take any additional evidence it deems necessary. The court, having due regard for orderly administration, the public interest, and the interests of the party, may grant such equitable relief as it deems appropriate, including enjoining future violations or ordering the agency to make public such portion of the transcript, recording, or minutes as is not exempt under subsection (c) of section 552b.

Subsection (h)(2) of section 552b, as contained in the conference substitute, provides that any Federal court otherwise authorized to review action (under provisions such as chapter 7 of title 5, U.S. Code, or chapter 158 of title 28, U.S. Code) may, on the application of any person properly participating in the review proceeding, inquire into violations of section 552b by the agency and afford such relief as it deems appropriate. Nothing in section 552b authorizes any

Federal court having jurisdiction solely on the basis of subsection (h)(1) to set aside, enjoin, or invalidate any agency action (other than an action, such as to close a meeting, or withhold a portion of a transcript, recording, minutes, or other information, taken pursuant to section 552b) taken or discussed at a meeting out of which a violation of section 552b arose.

The conferees do not intend the authority granted to the Federal courts by the first sentence of subsection (h)(2) to be employed to set aside agency action taken other than under section 552b solely because of a violation of section 552b in any case where the violation is unintentional and not prejudicial to the rights of any person participating in the review proceeding. Agency action should not be set aside for a violation of section 552b unless that violation is of a serious nature.

ATTORNEY FEES AND LITIGATION COSTS

Senate bill

Section 4(i) of the Senate bill authorized the court hearing an action under subsection (f), (g), or (h) of that section to assess against any party reasonable attorney fees and other litigation costs reasonably incurred by any other party who substantially prevails in the action. Costs may be assessed against an individual member of an agency only where the court finds that he has intentionally and repeatedly violated section 4, and against a plaintiff where the court finds that he initiated the suit for frivolous or dilatory purposes. In the case of apportionment of fees or costs against any agency, the fees or costs may be assessed against the United States.

House amendment

Subsection (i) of new section 552b, as contained in the House amendment, authorized the court hearing an action under subsection (g) or (h) of section 552b to assess against any party reasonable attorney fees and other litigation costs reasonably incurred by any other party who substantially prevails in the action. Costs may be assessed against a plaintiff only where the court finds that he initiated the suit primarily for frivolous or dilatory purposes. In the case of assessment of fees or costs against an agency, they may be assessed against the United States.

Conference substitute

The conference substitute is the same as the House amendment.

ANNUAL REPORT TO CONGRESS

Senate bill

Section 4(j) of the Senate bill required the agencies subject to the requirements of section 4 to report annually to Congress regarding their compliance, including the total number of meetings open to the public, the total number closed to the public, the reasons for the closings, and a description of any litigation brought against the agency under section 4.

House amendment

Subsection (j) of new section 552b of the House amendment required each agency subject to the requirements of the section to report annually to Congress regarding its compliance, including the total number of meetings open to the public, the total number closed to the

public, the reasons for the closings, and a description of any litigation brought against the agency under section 552b (including any fees or costs assessed against the agency in such litigation, whether or not paid by the agency).

Conference substitute

The conference substitute is the same as the House amendment.

RELATIONSHIP TO THE FREEDOM OF INFORMATION ACT, 5 U.S.C. 552

Senate bill

Section 6(a) of the Senate bill provided that except as specifically provided in section 4, nothing in section 4 confers any additional rights on any person or limits the existing rights of any person to inspect or copy, under 5 U.S.C. 552, any documents or written material within the possession of any agency. In the case of any request made pursuant to 5 U.S.C. 552 to copy or inspect the transcripts or recordings described in section 4(e) of the Senate bill, the provisions of this Act govern whether the transcripts or recordings are to be made available in response to the request.

Section 6(a) also makes the requirements of chapter 33 of title 44, United States Code, inapplicable to the transcripts and recordings described in section 4(e) of the Senate bill.

The Senate bill contained no provision amending the third exemption set forth in 5 U.S.C. 552(b).

House amendment

Subsection (k) of new section 552b, as included in the House amendment, provided that other than as specifically provided in section 552b, nothing in section 552b expands or limits the existing rights of any person under 5 U.S.C. 552, except that the provisions of this act govern in the case of any request made pursuant to 5 U.S.C. 552 to copy or inspect the minutes described in subsection (f) of new section 552b.

Subsection (k) also makes the requirements of chapter 33 of title 44, United States Code, inapplicable to the minutes described in subsection (f) of section 552b.

Section 5(b) of the House amendment amended the third exemption set forth in 5 U.S.C. 552(b) to include matters specifically exempted from disclosure by statute (other than the new section 552b), if the statute either requires that the matters be withheld from the public or establishes particular criteria for withholding or refers to particular types of matters to be withheld.

Conference substitute

The conference substitute provides that nothing in section 552b expands or limits the existing rights of any person under 5 U.S.C. 552, except that the exemptions in subsection (c) of section 552b shall govern in the case of any request made pursuant to 5 U.S.C. 552 to copy or inspect the transcripts, recordings or minutes described in subsection (f) of section 552b.

The conference substitute further provides that the requirements of chapter 33 of title 44, United States Code, shall not apply to the transcripts, recordings, and minutes described in subsection (f) of section 552b.

Section 5(b) of the conference substitute amends the third exemption in 5 U.S.C. 552(b) to include information specifically exempted from disclosure by statute (other than new section 552b), if the statute either (a) requires that the information be withheld from the public in such a manner as to leave no discretion on the issue, or (b) establishes particular criteria for withholding or refers to particular types of information to be withheld. The conferees intend this language to overrule the decision of the Supreme Court in *Administrator, FAA* v. *Robertson*, 422 U.S. 255 (1975), which dealt with section 1104 of the Federal Aviation Act of 1958 (49 U.S.C. 1504). Another example of a statute whose terms do not bring it within this exemption is section 1106 of the Social Security Act (42 U.S.C. 1306).

AUTHORITY TO WITHHOLD INFORMATION FROM CONGRESS

Section 6(a) of the Senate bill, subsection (*1*) of new section 552b of the House amendment, and subsection (*1*) of section 552b in the conference substitute all provide that the open meeting provisions of the legislation (section 552b of the conference substitute) do not constitute authority to withhold information from Congress.

CLOSING OF MEETINGS OTHERWISE REQUIRED TO BE OPEN

Senate bill

No comparable provision.

House amendment

Subsection (*1*) of new section 552b, as contained in the House amendment, provides that section 552b does not authorize the closing of any agency meeting otherwise required by law to be open.

Conference substitute

The conference substitute is the same as the House amendment.

RELATIONSHIP TO THE PRIVACY ACT OF 1974, 5 U.S.C. 552A

The Senate bill, the House amendment, and the conference substitute all provide that nothing in the open meeting provisions of this legislation (section 552b of the conference substitute) authorizes any agency to withhold from any individual any record, including the transcripts, recordings, and minutes required by these provisions, which is otherwise accessible to that individual under 5 U.S.C. 552a.

RELATIONSHIP TO FEDERAL ADVISORY COMMITTEE ACT, 5 U.S.C. APP. I

Senate bill

No comparable provisions.

House amendment

Subsection (n) of new section 552b of the House amendment provided that in the event that any meeting is subject to the provisions of the Federal Advisory Committee Act (5 U.S.C. App. I) as well as the provisions of section 552b, the meeting is governed by the provisions of section 552b.

Subsection 5(c) of the House amendment amended the Federal Advisory Committee Act to make advisory committee meetings subject to the exemptions contained in the new 5 U.S.C. 552b (enacted by this act), rather than to the exemptions contained in 5 U.S.C. 552.

This provision in the House bill is addressed to a problem that has arisen in administration of the Federal Advisory Committee Act, enacted in 1972. In establishing a requirement in that Act that meeting, of Executive Branch advisory committee should be open to the public, Congress adopted the exemption provisions set forth in the Freedom of Information Act (FOIA) to describe the few types of meetings that might properly be closed. Unfortunately, this approach has not been entirely satisfactory, largely because those exemptions were designed to deal with documents rather than meetings, and some agencies have closed advisory committee meetings for reasons not contemplated by Congress. The chief concern in this regard has been application of exemption 5, a provision intended to protect the confidentiality of purely *internal* governmental deliberations, as a basis for closing discussions with and among *outside* advisers. One court has given approval to the use of exemption 5 to close advisory committee meetings, *Aviation Consumer Action Project* v. *Washburn*, 535 F.2d 101 (D.C. Cir. 1976).

The House provision which was unanimously approved, is intended to cure this and similar problems by replacing the nine FOIA exemptions presently incorporated in the Federal Advisory Committee Act with the new exemptions of the Sunshine Act that have been expressly designed to govern meetings, as opposed to documents. This provision thus overrules the *Washburn* case and is intended to end agency reliance upon the "full and frank" discussion rationale for closing advisory committee meetings. Under this provision, portions of federal, advisory committee meetings may be, but are not required to be closed when they fall within one of the disclosure exemptions that are created for meetings of collegial bodies under section 552b of title 5, United States Code.

Conference substitute

Subsection 5(c) of the conference substitute amends the Federal Advisory Committee Act (5 U.S.C. App. I) to make advisory committee meetings subject to the exemptions contained in 5 U.S.C. 552b (enacted by this act).

The Conference substitute is the same as the House provision. The conferees, however, are concerned about the possible effect of this amendment upon the peer review and clinical trial preliminary data review systems of the National Institutes of Health. The conferees thus wish to state as clearly as possible that personal data, such as individual medical information, is especially sensitive and should be given appropriate protection to prevent clearly unwarranted invasions of individual privacy. While the conferees are sympathetic to the concerns expressed by NIH regarding its committees' funding recommendations and analysis of preliminary data, the conferees are equally sympathetic to concerns expressed by citizens' groups that important fiscal and health-related information not be unnecessarily withheld from the public.

With these competing interests in mind, the conferees have secured assurances that the appropriate House and Senate committees will

review the unique problems of NIH under the new standards. Indeed, it is noted that the Subcommittee on Reports, Accounting and Management of the Senate Government Operations Committee has already held three days of hearings on this matter and plans to continue with further inquiry at an early date.

Ex Parte Communications

PROHIBITION

Senate bill

Section 5(a) of the Senate bill added a new subsection (d) to 5 U.S.C. 557. Subsection (d) provided that in any agency proceeding subject to 5 U.S.C. 557(a), except as required for the disposition of ex parte matters as authorized by law—

(1) no interested person outside the agency shall make or knowingly cause to be made to any member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, an ex parte communication relevant to the merits of the proceeding;

(2) no member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding shall make or knowingly cause to be made to an interested person outside the agency an ex parte communication relevant to the merits of the proceeding;

(3) a member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of such proceeding who receives, or who makes, a communication in violation of subsection (d), shall place on the public record of the proceeding:

(A) written communications transmitted in violation of subsection (d);

(B) memorandums stating the substance of all oral communications occurring in violation of subsection (d); and

(C) responses to the materials described in the two preceding paragraphs;

(4) upon receipt of a communication knowingly made by a party, or which was knowingly caused to be made by a party in violation of subsection (d), the agency, administrative law judge, or other employee presiding at the hearing may, to the extent consistent with the interests of justice and the policy of the underlying statutes, require the person or party to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected by virtue of such violation;

(5) the prohibitions of subsection (d) shall apply at such time as the agency might designate, but in no case later than the time at which a proceeding is noticed for hearing unless the person responsible for the communication has knowledge that it will be noticed, in which case the prohibitions shall apply at the time of his acquisition of such knowledge.

Section 6(a) of the Senate bill provided that the act does not authorize any information to be withheld from Congress.

House amendment

Section 4(a) of the House amendment added a new subsection (d) to 5 U.S.C. 557. Subsection (d) provided that in any agency proceeding subject to 5 U.S.C. 557(a), except as required for the disposition of ex parte matters as authorized by law—

(1) no interested person outside the agency shall make or cause to be made to any member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, an ex parte communication relative to the merits of the proceeding;

(2) no member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be, involved in the decisional process of the proceeding, may make or cause to be made to any interested person outside the agency an ex parte communication relative to the merits of the proceeding;

(3) a member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of such proceeding who receives, or who makes or caused to be made, a communication prohibited by subsection (d) shall place on the public record of the proceedings:

(A) all such written communications;

(B) memoranda stating the substance of all such oral communications; and

(C) all written responses, and memoranda stating the substance of all oral responses, to the materials described in the two preceding paragraphs;

(4) in the event of a communication prohibited by this subsection and made or caused to be made by a party or interested person, the agency, administrative law judge, or other employee presiding at the hearing may, to the extent consistent with the interests of justice and the policy of the underlying statutes, require the person or party to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation; and

(5) the prohibitions of subsection (d) shall apply beginning at such time as the agency may designate, but in no case later than the time at which a proceeding is noticed for hearing unless the person responsible for the communication has knowledge that it would be noticed, in which case the prohibitions shall apply beginning at the time of his acquisition of such knowledge.

Subsection (d)(2), as added by the House amendment, provided that subsection (d) does not constitute authority to withhold information from Congress.

Conference substitute

The conference substitute is the same as the Senate bill, except as follows:

1. The requirement of placing material on the public record applies to an agency decisionmaking official who knowingly causes an ex parte communication to be made, as well as to one who receives or makes such a communication.

2. The conference substitute clarifies the time at which the prohibition on ex parte communications begins to apply.

3. The provision that subsection (d) is not authority to withhold information from Congress is included in the subsection as paragraph (2).

4. Although the conference substitute does not contain express provision for sanctions against an interested person (who is not a party) who makes a prohibited communication, the conferees intend that such a person be subject to all sanctions provided in the bill if he later becomes a party to the proceeding.

The word "relevant" is not used in the strict evidentiary sense, but is intended to apply to communications bearing on the merits or affecting the merits.

DEFINITION OF "EX PARTE COMMUNICATION"

Senate bill

Section 5(b) of the Senate bill defined an ex parte communication as an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given.

House amendment

Section 4(b) of the House amendment defined an ex parte communication as an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given. The definition expressly excluded requests for information on or status reports relative to any matter or proceeding covered by subchapter II of chapter 5 of title 5, United States Code.

Conference substitute

The conference substitute defines an ex parte communication as an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given. The definition contained in the conference substitute expressly excludes requests for status reports on any matter or proceeding covered by subchapter II of chapter 5 of title 5, United States Code.

The conferees wish to note the fact that this provision and the ex parte provisions of new section 557(d) (as added by this act) in no way prohibit—

1. any communication with an agency decisionmaking official if not involving a formal adjudicatory proceeding (and a few formal rulemaking proceedings); or

2. any communication with a decisionmaking official is not relevant to the merits of a covered proceeding; or

3. any communication with a decisionmaking official in any proceeding at any time if it involves only a request for the status of the proceeding and is not intended to affect the merits; or

4. any communication at any time with an agency official not involved in the decisional process.

SANCTIONS

Senate bill

Section 5(c) of the Senate bill amended 5 U.S.C. 556(d) to permit an agency, to the extent consistent with the interests of justice and the policy of the underlying statutes administered by the agency, to consider a violation of 5 U.S.C. 557(d), as added by this act, sufficient grounds for a decision on the merits adverse to a party who has knowingly committed or caused the violation.

House amendment

Section 4(c) of the House amendment amended 5 U.S.C. 556(d) to permit an agency, to the extent consistent with the interests of justice and the policy of the underlying statutes administered by the agency, to consider a violation of 5 U.S.C. 557(d), as added by this act, sufficient grounds for a decision on the merits adverse to a person or party who has committed or caused the violation.

Conference substitute

The conference substitute is the same as the Senate bill.

Conforming Amendment and Effective Dates

U.S. POSTAL SERVICE

Senate bill

No comparable provision.

House amendment

Section 5(a) of the House amendment amended 39 U.S.C. 410(b)(1) to make clear the fact that new section 552b and the Privacy Act of 1974 (5 U.S.C. 552a) apply to the United States Postal Service.

Conference substitute

The conference substitute is the same as the House amendment.

EFFECTIVE DATES

The Senate bill, the House amendment, and the conference substitute all provide that this act shall take effect 180 days after the date of its enactment, except that the provision requiring the promulgation of agency regulations to implement the open meeting provisions (new section 552b(g)), as contained in the conference substitute, shall take effect upon enactment.

Abe Ribicoff,
Edmund S. Muskie,
Lee Metcalf,
Lawton Chiles,
C. H. Percy,
J. Javits,
W. V. Roth, Jr.,
Managers on the Part of the Senate.

Jack Brooks,
John E. Moss,
Dante B. Fascell,
John Conyers,
Bella S. Abzug,
Walter Flowers,
George E. Danielson,
Barbara Jordan,
R. L. Mazzoli,
Edward W. Patterson,
Frank Horton,
Paul N. McCloskey, Jr.,
Carlos J. Moorhead,
Thomas N. Kindness,
Managers on the Part of the House.

[From the Congressional Record—House, Aug. 31, 1976]

(H 9258–H 9262)

Conference Report on S. 5, Government in the Sunshine Act

Mr. Brooks. Mr. Speaker, I call up the conference report on the Senate bill (S. 5) * to provide that meetings of Government agencies shall be open to the public, and for other purposes, and ask unanimous consent that the statement of the managers be read in lieu of the report.

The Clerk read the title of the Senate bill.

The Speaker. Is there objection to the request of the gentleman from Texas?

There was no objection.

The Clerk read the statement.

(For conference report and statement see proceedings of the House of August 26, 1976.)

Mr. Brooks (during the reading). Mr. Speaker, I ask unanimous consent that further reading of the statement be dispensed with.

The Speaker. Is there objection to the request of the gentleman from Texas?

There was no objection.

The Speaker. The gentleman from Texas (Mr. Brooks) is recognized for 30 minutes.

Is the gentleman going to take time?

Mr. Brooks. Mr. Speaker, I will ask permission to revise and extend my remarks.

GENERAL LEAVE

Mr. Speaker, I ask unanimous consent that all Members may have 5 legislative days in which to revise and extend their remarks on the conference report under consideration.

The Speaker. Is there objection to the request of the gentleman from Texas?

There was no objection.

Mr. Horton. Mr. Speaker, will the gentleman yield?

Mr. Brooks. Certainly, I am delighted to yield to the ranking Republican member of the committee.

Mr. Horton. Mr. Speaker, I think it would be in order if the chairman of the committee would explain to the House the action of the conferees on this bill. This is a rather important bill. It did carry by a large margin in the House.

We have concluded the conference, and we have concluded the conference report. There were some difficulties because of amendments that were adopted on the floor, but for practical purposes the conferees have agreed. There were diverse views during the conference, but those were reconciled.

Mr. Speaker, I personally support the conference report and urge its adoption, but I thought perhaps the chairman of the committee could explain briefly what the conference report does.

Mr. Brooks. Mr. Speaker, the conference report resolves the differences between the House and the Senate. I am delighted that the gentleman has joined with me in supporting the conference report. We

---

*See p. 783.

worked all day on it, and the conferees have agreed. I was very pleased to have the gentleman's help.

Mr. HORTON. Mr. Speaker, will the gentleman yield?

Mr. BROOKS. I yield to the gentleman from New York.

Mr. HORTON. Mr. Speaker, if I may explain the bill briefly, what this is is the bill which we had a couple of weeks ago to provide for open meetings of legal bodies which, for all practical purposes, are those bodies headed by two or more individuals of the regulatory agencies.

We did have some difficulties with definitions of "meetings" and the requirement of transcripts.

This matter was referred to the Committee on the Judiciary sequentially from the Committee on Government Operations, and we did have a large vote on the floor after the amendments were adopted. Those amendments had to do with meetings and transcripts. The conferees reconciled those differences between the Senate and the House on those matters; and for all practical purposes, the amendments that were suggested by the Committee on the Judiciary were adopted by the conferees.

Mr. Speaker, as I have indicated, I think it is a good conference report and I urge its adoption.

Mr. BROOKS. Mr. Speaker, I thank my friend, the gentleman from New York (Mr. HORTON), for a splendid explanation.

(Mr. BROOKS asked and was given permission to revise and extend his remarks.)

Mr. BROOKS. Mr. Speaker, the Government in the Sunshine Act passed both the Senate and the House by overwhelming margins.

On August 3, 1976, the House and Senate conferees met to work out the differences in the two versions. After long hours of work, agreement was reached and on August 26 the conference report was filed in the House with the signatures of all House and Senate conferees.

I would like to mention the major aspects of this report. There was a major disagreement between the House and Senate on the definition of "meeting" as used in the bill. The compromise was worked out, the definition of "meeting" now reads "the deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations determine or result in the joint conduct or disposition of official agency business, but does not include deliberations required or permitted by subsections (d) and (e)." The conferees recommend this language as a reasonable compromise.

The second major area of disagreement between the Senate and the House versions was the Senate requirement of a verbatim transcript of each meeting closed to the public under this bill. The House version required that written minutes be kept of closed meetings. The compromise would have an agency make a verbatim transcript or electronic recording of each meeting closed to the public unless the meeting were closed under the following three exemptions: First, meetings to discuss regulation of financial institutions; second, meetings in which the information discussed might lead to financial speculation; and third, meetings dealing with adjudicatory proceedings or civil actions. If the meeting falls within one of these three exemptions, the agency may choose to make either a transcript, an electronic recording, or full and complete minutes.

Other issues dealt with by the conference are discussed in the conference report. I feel that the conferees, in this report, have come up with a measure which both the Senate and the House can and should accept. Along with the other 13 House conferees. I recommend this report to the House and urge its immediate passage so that the goal of Government in the sunshine can be reached.

Ms. ABZUG. Mr. Speaker, as the primary sponsor of the House version of the Government in the Sunshine bill (H.R. 11656) I am pleased and proud to rise in support of this conference report.

My subcommittee, the Subcommittee on Government Information and Individual Rights, the subcommittee ably chaired by the gentleman from Alabama (Mr. FLOWERS), and our full committees, headed by Chairman JACK BROOKS and Chairman PETER RODINO, have put an enormous amount of time and effort into this legislation, and I believe that it heralds a new day in relationships between the Federal regulatory agencies and the public.

The Government in the Sunshine Act will, for the first time in our history, require most of the Federal regulatory agencies to open their meetings to the public. Part of the disenchantment with the Federal Government has been the feeling of citizens that it does its work behind closed doors and in concert with special interests. This bill, which limits ex parte communications between regulated industries and agency commissioners in addition to opening agency meetings, will permit citizens to see for themselves whether the agencies are acting in the public interest.

MAJOR POINTS OF THE BILL

Some of the bill's major points are:

First, all meetings of a quorum of an agency's commissioners that determine or result in the conduct or disposition of agency business must be open unless they come within one of the bill's 10 specific exemptions;

Second, even if the subject matter of the discussion comes within one of the exemptions, it must be an open discussion if the public interest so requires, and the agency has the burden of justifying a decision to close a meeting;

Third, the agency must publicly announce, at least one week in advance of a meeting—except in emergencies—the time, place, and subject matter of the meeting, whether it is open or closed, and the name and phone number of an agency official who will respond to the public's questions about the meeting;

Fourth, the agency must keep a transcript or electronic recording of each closed meeting. For meetings discussing bank condition reports, or information whose premature disclosure may lead to financial speculation, or the agency's involvement in an adjudicatory proceeding or civil action, minutes may be kept instead. All portions of the transcript, transcription, or minutes that turn out not to contain exempt material must be released to the public after the meeting;

Fifth, any person may challenge in court the closing of a meeting or the withholding of information under the Sunshine Act. The court may enjoin further violations of the act by the agency, or order the disclosure of any nonexempt material in the transcript, transcription, or minutes, or grant other appropriate relief. Attorney's fees may be awarded in appropriate instances; and

Sixth, persons interested in the outcome of adjudicatory proceedings—and some rulemaking proceedings—before administrative agencies will be prohibited from communicating with agency commissioners or other agency decisionmaking personnel unless the communications are placed upon the public record or all other parties to the proceeding have adequate advance notice that they will be made. A party violating this prohibition could be the subject of sanctions up to and including loss of the proceeding on the merits.

CONFERENCE COMPROMISES

Thomas Jefferson wrote that—

> At free conferences the managers discuss, viva voce and freely, and interchange propositions for such modifications as may be made in a parliamentary way, and may bring the sense of the two Houses together. Jefferson's Manual of Parliamentary Procedure, section 539.

The conference on this bill was no exception, and all 21 conferees worked long and hard to arrive at reasonable compromises of the differences between our version of the bill and the version that passed the other body last November. All 21 of us have signed this conference report.

We adopted the Senate's basic definition of what constitutes a meeting, but clarified the definition as one applying to deliberations that "determine or result in" the conduct or disposition of agency business, rather than deliberations that "concern" agency business.

With respect to the third exemption from the open meeting requirements—the exemption that incorporates other disclosure statues by reference—we agreed upon the basic House position, clarified to include statutes lacking specific criteria only if their withholding requirement is absolute and without exception. I have been asked whether 50 U.S.C. 403g, a statute relating to CIA exemption from laws such as the Sunshine Act and the Freedom of Information Act, comes within the third exemption as recommended by the conference. I have examined section 403g and believe that it does come within the exemption.

On the issue of transcripts as opposed to minutes of closed meetings, the Senate had opted for the former and the House for the latter. The conference compromise requires transcripts or electronic recordings for closed meetings as a general rule. In the case of meetings dealing with bank condition information, or information whose premature disclosure might lead to financial speculation, or dealing with agency participation in adjudicatory proceedings or civil actions, the agency is afforded the option of keeping minutes instead.

On the question of venue, we have recommended the House provision, which permits actions under the Sunshine Act to be brought under the Sunshine Act to be brought where the agency has its headquarters, where the meeting in question is held, or here in the District of Columbia. As provided in 5 U.S.C. 552b(k), as enacted by this bill, venue in actions pursuant to the Freedom of Information Act continues to be the plaintiff's residence or place of business, the location of the records of business, the location of the records in question, or the District of Columbia.

The conferees have recommended that the House accept what is in essence Senate language regarding judicial review of agency pro-

ceedings on the merits. When a court is reviewing substantive agency action on the merits, it is authorized to review Sunshine Act violations as well and to afford such relief as it deems appropriate. While this provision permits a court to overturn substantive agency action because of a violation of the Sunshine Act, such drastic relief should be awarded only where the violation is of a serious nature.

Finally, the conferees have recommended deletion of the Senate provision making agency members liable for attorney's fees where they are found to have intentionally and repeatedly violated the act. This is a provision that I would have preferred to see retained in the bill, and I expect to see it included in future amendments to this act if agency members abuse their trust in the area of open meetings.

Before concluding, I would like to observe that in the past day or so, I have received another of the weighty missives that have arrived regularly from the Federal Trade Commission during the last year. The essence of this letter seems to be a request for congressional approval of an approach to this legislation that has been rejected from the start; namely, the idea of establishing "functional categories" of agency business and permitting blanket closing of any discussion of business said by an agency to fall within one of these general categories.

That is not what this legislation provides. Under this bill, each item of business must be examined individually to ascertain whether it comes within an exemption. Further, even if a piece of information does fall within an exemption, the agency is bound to keep the meeting open if the public interest so requires.

I appreciate what may be an honestly felt need on the part of the FTC to have us explain exactly how each general category of its business should be treated, but under this act, neither we nor they can do that. The mere fact that a discussion falls into one or another general category does not guarantee its classification under this bill. Each item—and not merely each general category—must be considered on its own merits. If it is found that a given item comes within one or more of the exemptions and also that disclosure of the item would not be in the public interest, then the consideration of the item may be closed.

CONCLUSION

I strongly believe that the bill will ably carry out its purpose—to provide the public with the fullest practicable information regarding the decisionmaking processes of our Government, while protecting the rights of individuals and the ability of the Government to carry out its responsibilities. I fully expect that we in the Congress, and the public at large, will be vigorous in insisting upon the strict enforcement of the basic presumption of openness which is the keystone of this bill.

I urge adoption of the conference report.

Mr. HORTON. Mr. Speaker, I rise in support of the conference report on S. 5, the Government in the Sunshine Act. The conference report represents the work of the House and Senate in resolving many of the differences.

Definitions of meetings, minutes, and verbatim transcripts have been developed which should meet the dual requirements of the public's

80-459 O - 77 - 53

right to know and those legitimate occasions when a meeting must be closed.

The bill applies to all Federal agencies composed of two or more people. It requires all meetings of these boards, commissions, and so forth, to be open to the public except where the subject matter of the meetings falls under one of 10 categories of exemptions. The exemptions essentially parallel the Freedom of Information Act which protects national security, information, trade secrets, and other sensitive categories of Government documents from publication.

It is important, I believe, that this bill receive prompt approval by the President. The public's access to the deliberations of Government agencies which regulate their lives is essential in a free society.

At the same time, I hope the Congress will not hesitate to examine the implementation of this legislation after there has been ample time to test its impact. All too frequently, we have adopted legislative requirements for executive agencies which become overburdened with regulations which destroy the intent and the purpose of the act. Government in the Sunshine deserves a better fate.

I urge adoption of the conference report on S. 5.

Mr. FASCELL. Mr. Speaker, I rise in support of the conference report on S. 5, the Government in the Sunshine bill, and urge that it be adopted.

The bill is in the same form substantially as it passed the House by an overwhelming margin. Two important amendments were made in the House-Senate conference committee—

On the issue of the definition of a "meeting", the conference report accepts the Senate wording except that deliberations would have to "determine or result in" the joint conduct or disposition of agency business, rather than merely "concern" such activities. This language is intended to permit casual discussions between agency members that might invoke the bill's requirements under the less formal "concern" standard. At the same time, the conference report includes telephone conference calls under the definition of a "meeting" if they involve the required number of agency members and otherwise meet the definition.

On the issue of requiring transcripts to be kept of agency meetings, the conference report moves in the direction of an amendment accepted on the House floor by permitting the Federal Reserve Board and other agencies involved in the regulation of financial institutions to exempt sensitive meetings from the transcript requirement. In such cases, only minutes would be required.

The conference report resolves the other minor differences between the House and Senate bills in a manner which I feel is in keeping with the basic purposes of the legislation.

As the principal House sponsor of this important measure, I fully support the conference bill and recommend its adoption. It will provide an effective yet fair mechanism for assuring that the deliberations of our Federal Government agencies are open to public observation.

The bill incorporates adequate safeguards for assuring that matters which must be taken up in closed session in the public interest may receive this protection. Our agencies will be able to carry out their functions and duties in an efficient way, while the public will have greater confidence in the integrity of the decisionmaking process.

It is difficult to legislate ethics in a system as widespread and

diverse as our network of regulatory agencies, boards, and commissions. Basic standards can be written into statutory law, but this could not cover the infinite number of situations which might arise over a period of years among the 50 or so agencies affected by the bill. By permitting the public to attend meetings, however, our people can decide for themselves when questions arise as to the propriety of decisions, or actions by agency members.

Congress has already applied the sunshine principle to its own meetings. We have found that it is a fine prescription for the healthy and proper conduct of public business.

The same will be true of the agencies affected by S. 5, the adoption of which I strongly recommend.

Mr. MOORHEAD of California. Mr. Speaker, I support the Government in the Sunshine legislation for two reasons. First, I firmly believe that in most instances that the American public has a right to know how its Government decides important policy questions. Second, I also believe that increased public scrutiny of the administrative process can mean that an arbitrary and often unrepresentative bureaucracy will become more sensitive to the people that they are paid to serve.

However, at the same time, my endorsement of S. 5, as it comes from the conference committee, is not without certain reservations. The bill contains an ambiguous and potentially troublesome definition of "meeting." The compromise on the verbatim transcript requirement is, in effect, no compromise at all. And, finally, the bill still recognizes the right of "any person" to sue to enforce the provisions of a Sunshine law, a provision which I have viewed all along as being most ill-advised.

No one wants to be recorded against "Sunshine." I understand that and recognize the political realities. Furthermore, on balance, I think it can be said that this is needed legislation. But in fairness to both my constituents and my colleagues, I could not cast an "aye" vote without expressing some reluctance.

Mr. KINDNESS. Mr. Speaker, since I was, at best, a reluctant signatory to the conference report, I wanted to take this opportunity to share some brief observations with the membership of this House.

When the government in the sunshine legislation was debated on July 28, I expressed an ambivalent attitude about its value. Unfortunately, nothing occurred during the House-Senate conference on S. 5 to relieve me of my fears or misgivings.

It should be recalled when the House considered its version of the government in the sunshine bill (H.R. 11656), it approved two very important amendments offered by the gentleman from New York (Mr. HORTON). The first resulted in a revised definition of "meeting," so as to make it more specific and to make it clear we were not intending to cover mere chance meetings or social gatherings. A second amendment deleted the sweeping and onerous verbatim transcript requirement from the bill. Neither of these key amendments survived the deliberations of the conference.

So, what we are left with is a bill that has some very good provisions and some very bad ones. The government in the sunshine legislation recognizes, and rightly so, that the meetings and deliberations of Federal agencies should be open to public scrutiny. The other side of it is that certain governmental functions owe their very success to something less than total sunshine. S. 5 does not always recognize this

distinction. The section on verbatim transcripts purports to exempt from its requirements those agencies, such as the Federal Reserve Board and SEC, that deal with sensitive economic matters. But, as an alternative they are still made subject to such detailed "minute requirements," that one is hard pressed to see any advantage.

For many Government agencies, compliance with this statute will be time consuming and counterproductive. As it comes from the conference committee, S. 5 may well represent the final triumph of procedure over substance. Like its philosophical predecessor, this legislation is based on a valid principle but its implementation might well result in some negative "surprises."

Mr. BROOKS. Mr. Speaker, I move the previous question on the conference report.

The previous question was ordered.

The SPEAKER. The question is on the conference report.

Mr. LLOYD of California. Mr. Speaker, I object to the vote on the ground that a quorum is not present and make the point of order that a quorum is not present.

The SPEAKER. Evidently a quorum is not present.

The Sergeant at Arms will notify absent Members.

The vote was taken by electronic device, and there were—yeas 384, nays 0, not voting 47, as follows:

[Roll No. 677]

YEAS—384

Abdnor
Adams
Addabbo
Alexander
Allen
Ambro
Anderson, Calif.
Anderson, Ill.
Andrews, N.C.
Andrews, N. Dak.
Annunzio
Archer
Armstrong
Ashbrook
Aspin
AuCoin
Bafalis
Baldus
Baucus
Bauman
Beard, R.I.
Beard, Tenn.
Bedell
Bell
Bennett
Bevill
Biaggi
Biester
Bingham
Blanchard
Blouin
Boggs
Boland
Bolling
Bonker
Bowen
Brademas
Breaux
Breckinridge
Brinkley
Brodhead
Brooks
Broomfield
Brown, Calif.
Brown, Mich.
Brown, Ohio
Buchanan
Burgener
Burke, Calif.
Burke, Fla.
Burke, Mass.
Burleson, Tex.
Burlison, Mo.
Burton, John
Burton, Phillip
Butler
Byron
Carney
Carr
Carter
Chisholm
Clancy
Clausen, Don H.
Clawson, Del
Cleveland
Cochran
Cohen
Collins, Tex.
Conable
Conte
Conyers
Corman
Cornell
Cotter
Coughlin
Crane
D'Amours
Daniel, Dan
Daniel, R. W.
Daniels, N.J.
Danielson
Davis
Delaney
Dellums
Dent
Derrick
Derwinski
Devine
Dickinson
Diggs
Dingell
Dodd
Downey, N.Y.
Downing, Va.
Drinan
Duncan, Oreg.
Duncan, Tenn.
du Pont
Early
Eckhardt
Edgar
Edwards, Ala.
Edwards, Calif.
Eilberg
Emery
English
Erlenborn
Esch

Eshleman
Evans, Colo.
Evans, Ind.
Fary
Fascell
Fenwick
Findley
Fisher
Fithian
Flood
Florio
Flowers
Flynt
Foley
Ford, Mich
Fraser
Frenzel
Frey
Gaydos
Giaimo
Gibbons
Gilman
Ginn
Goldwater
Gonzalez
Goodling
Gradison
Grassley
Gude
Guyer
Hagedorn
Haley
Hall, Ill.
Hall, Tex.
Hamilton
Hammer-
schmidt
Hanley
Hannaford
Hansen
Harkin
Harrington
Harris
Harsha
Hayes, Ind.
Hechler, W. Va.
Hefner
Henderson
Hicks
Hightower
Hillis
Holland
Holt
Holtzman
Horton
Howard
Howe
Hubbard
Hughes
Hungate
Hutchinson
Hyde
Ichord
Jacobs
Jarman
Jeffords
Jenrette
Johnson, Calif.
Johnson, Colo.
Johnson, Pa.
Jones, N.C.
Jones, Okla.
Jones, Tenn.
Jordan
Kasten
Kastenmeier
Kazen
Kelly
Kemp
Ketchum
Keys
Kindness
Koch
Krebs
Krueger
LaFalce
Lagomarsino
Landrum
Latta
Leggett
Lent
Levitas
Lloyd, Calif.
Lloyd, Tenn.
Long, La.
Long, Md.
Lott
Lujan
Lundine
McClory
McCollister
McCormack
McDade
McDonald
McEwen
McFall
McHugh
McKay
McKinney
Madden
Madigan
Maguire
Mahon
Mann
Martin
Mathis
Mazzoli
Meeds
Melcher
Metcalfe
Meyner
Mezvinsky
Michel
Mikva
Milford
Miller, Calif.
Miller, Ohio
Mills
Mineta
Minish
Mink
Mitchell, Md.
Mitchell, N.Y.
Moakley
Moffett
Mollohan
Montgomery
Moore
Moorhead,
Calif.
Moorhead, Pa.
Morgan
Mosher
Moss
Mottl
Murphy, Ill.
Murphy, N.Y.
Murtha
Myers, Ind.
Myers, Pa.
Natcher
Neal
Nedzi
Nichols
Nix
Nolan
Nowak
Oberstar
Obey
O'Brien
O'Neill
Ottinger
Patterson,
Calif.
Pattison, N.Y.
Paul
Pepper
Perkins
Pettis
Pickle
Pike
Poage
Pressler
Preyer
Price
Pritchard
Quie
Railsback
Randall
Rangel
Regula
Reuss
Rhodes
Richmond
Riegle
Rinaldo
Roberts
Robinson
Rodino
Roe
Rogers
Roncalio
Rooney
Rose
Rosenthal
Roush
Rousselot
Roybal
Ruppe
Russo
Ryan
St Germain
Santini
Sarasin

Sarbanes
Satterfield
Scheuer
Schneebeli
Schroeder
Schulze
Sebelius
Seiberling
Sharp
Shipley
Shriver
Shuster
Sikes
Simon
Skubitz
Slack
Smith, Iowa
Smith, Nebr.
Snyder
Solarz
Spellman
Spence
Staggers
Stanton,
J. William
Stark
Steed
Steiger, Wis.
Stephens
Stokes
Stratton
Stuckey
Studds
Sullivan
Symington
Symms
Talcott
Taylor, Mo.
Teague
Thompson
Thone
Thornton
Traxler
Treen
Tsongas
Udall
Ullman
Van Deerlin
Vander Jagt
Vander Veen
Vanik
Vigorito
Waggonner
Walsh
Wampler
Waxman
Weaver
Whalen
White
Whitehurst
Whitten
Wiggins
Wilson, Bob
Wilson, C. H.
Wilson, Tex.
Winn
Wirth
Wolff
Wright
Wydler
Yates
Yatron
Young, Fla.
Young, Ga.
Young, Tex.
Zablocki

NAYS—0

NOT VOTING—47

Abzug
Ashley
Badillo
Bergland
Broyhill
Cederberg
Chappell
Clay
Collins, Ill.
Conlan
de la Garza
Evins, Tenn.
Fish
Ford, Tenn.
Forsythe
Fountain
Fuqua
Green
Hawkins
Hays, Ohio
Hébert
Heckler, Mass.
Heinz
Helstoski
Hinshaw
Jones, Ala.
Karth
Lehman
McCloskey
Matsunaga
O'Hara
Passman
Patten, N.J.
Peyser
Quillen
Rees
Risenhoover
Rostenkowski
Runnels
Sisk
Stanton,
James V.
Steelman
Steiger, Ariz.
Taylor, N.C.
Wylie
Young, Alaska
Zeferetti

The Clerk announced the following pairs:

Mr. Lehman with Mr. Sisk.
Ms. Abzug with Mr. Young of Alaska.
Mr. Matsunaga with Mr. Broyhill.
Mr. Zeferetti with Mr. Evins of Tennessee.
Mr. de la Garza with Mr. Forsythe.
Mr. Chappell with Mr. Cederberg.
Mr. Badillo with Mr. Heinz.
Mr. Hébert with Mr. Green.
Mr. Hawkins with Mr. Fish.
Mr. Fuqua with Mr. Jones of Alabama.
Mr. Rostenkowski with Mr. McCloskey.
Mr. Runnels with Mr. Conlan.
Mr. Taylor of North Carolina with Mr. James V. Stanton.
Mr. Passman with Mr. Quillen.
Mr. Fountain with Mr. Steelman.
Mr. Bergland with Mr. Peyser.
Mr. Ashley with Mr. Steiger of Arizona.
Mr. Clay with Mr. Karth.
Ms. Collins of Illinois with Mr. Wylie.
Mr. Ford of Tennessee with Mr. Rees.
Mr. Helstoski with Mr. O'Hara.
Mr. Patten with Mr. Hays of Ohio.
Mr. Risenhoover with Mrs. Heckler of Massachusetts.

So the conference report was agreed to.

The result of the vote was announced as above recorded.

A motion to reconsider was laid on the table.

[From the Congressional Record—Senate, Aug. 31, 1976]

(S 15043–S 15045)

Government in the Sunshine Act—Conference Report

Mr. Chiles. Mr. President, I submit a report of the committee of conference on S. 5, and ask for its immediate consideration.*

The Presiding Officer. The report will be stated by title.

The legislative clerk head as follows:

The committee of conference on the disagreeing votes of the two Houses on the amendment of the House to the bill (S. 5) to provide that meetings of Government agencies shall be open to the public, and for other purposes, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses this report, signed by all of the conferees.

The Presiding Officer. Without objection, the Senate will proceed to the consideration of the conference report.

(The conference report is printed in the Record of August 26, 1976, beginning at page H9137.)

Mr. Chiles. I urge the Senate to give final approval today to the conference report on S. 5, the Government in the Sunshine Act.

Final approval of this legislation will mark the beginning of a new era in the way our Government operates.

For the first time a large number of Federal agencies will conduct their most important meetings in public.

This has never been done before at the Federal level.

This act makes more meaningful the important principle that in a democracy, the public has a right to know not only what its Government decides, but why, and by what process. Today many people view their Government as too remote. They cannot identify with it. This legislation should help reaffirm that our Government is part of the people, not apart from it.

The overwhelming effect of this legislation should be to make our Government stronger and the public's confidence in our Government greater.

The bill will require agencies to make some adjustments in the way they do business. New attitudes may have to be learned, and old ones changed. But I am confident that the agencies can and will implement this act in a way that is fully in accord with the principles of openness on which the legislation is based.

As one Member of the Senate, I intend to do all I can to see that implementation of this bill is both full and reasonable.

The House and Senate passed versions of S. 5 were in most major respects similar. The bill agreed upon by the conferees is substantially similar to the bill passed by the Senate last November by a vote of 94 to 0.

All meetings among the commissioners that head independent regulatory bodies, or similar agencies, must be open as a general rule. Meet-

*A copy of the Senate Conference Report (S. Rept. 94–1187) may be found on p. 783. It is identical in content to the House Conference Report (H. Rept. 94–1441).

ings may be closed only if the subject matter to be discussed falls within 10 specified exemptions for sensitive matters and the agency votes to close the meeting. The agency must keep a full record of any meeting that is closed to the public. Other provisions require timely public announcement of all agencies and whether they will be open to the public or not. An additional section of the bill contains for the first time a general statutory prohibition of ex parte communications relevant to the merits of agency adjudication. This section also specifies the remedial measures that must be taken in the event that an ex parte communication does occur.

A full description of the differences between the House and Senate versions, and the resolution of those differences is contained in the joint statement of managers.

The following is a brief summary of the resolution of the most important differences between the two bills:

First, Definition of meeting and related terms.—The Senate defined meeting to mean "the deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations concerned the joint conduct or dispositions of official agency business."

The House defined "meeting" to mean "a gathering to jointly conduct or dispose of agency business by two or more, but at least the number of individual agency members required to take action on behalf of the agency."

The compromise version defines "meeting" to mean "the deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations determine or result in the joint conduct or disposition of official agency business, but does not include deliberations required or permitted by subsections (d) or (e)."

Second. Exemption for premature disclosure of information.—The Senate provision qualifying the exemption for premature disclosure of certain information applied to the entire exemption, including the portion applicable to any agency which regulates currencies, securities, commodities, or financial institutions, as well as to all other agencies. In the comparable House provision, the qualifications on the exemption did not apply to agencies which regulate currencies, securities, commodities, or financial institutions. The actual wording of the exemption was somewhat different in the two versions as well. The compromise position accepted the Senate language and made it applicable to all agencies other than agencies that regulate currencies, securities, commodities, or financial institutions.

Third. Exemption of limitations on disclosures in other statutes.—

The Senate permitted an agency to close a meeting to protect "information required to be withheld by any other statute establishing particular criteria or referring to particular types of information." The comparable House clause exempts "matters specifically exempted from disclosure by statute—other than section 552 of this title—provided that such statute (A) requires that the matters be withheld from the public or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;"

The conference substitute applies only to a statute that either "(a) requires that the information be withheld from the public in such a manner as to leave no discretion on the issue, or (b) establishes particular criteria for withholding or refers to particular types of information to be withheld."

B. FREEDOM OF INFORMATION ACT PROVISION

The Senate did not amend the comparable provision now in the Freedom of Information Act exempting from disclosure information specifically exempted by other statutes. The House amended the comparable provision in the Freedom of Information Act to conform to the Sunshine Act exemption. The conference substitute is the House provision.

Fourth. Requirements for transcripts or minutes.—The Senate required an agency to keep a transcript or an electronic recording of closed agency meetings. The transcripts or electronic recordings were to be maintained for at least two years, but disclosure of transcripts containing sensitive matters was protected. The House did not require an agency to keep transcripts of closed meetings. Instead, it required the General Counsel to certify publicly that the meeting may be closed under one of the exemptions and to state the relevant exemption. This information would have been kept as part of the minutes of the closed meeting. The minutes would also have included information on the generic subject matter of the meeting and actions taken on them. The House also required each agency to maintain and disclose minutes of open meetings.

Under the compromise the agency is required to keep a verbatim transcript or electronic recording of each meeting or portion closed to the public unless a meeting has been closed under exemption 8, concerning bank reports, exemption 9(A), concerning information likely to lead to financial speculation, and exemption 10, concerning adjudicatory proceedings or civil actions. In such case, the agency may elect to make either a transcript, an electronic recording, or minutes containing a full and clear description of all matters discussed and all views expressed on any matter discussed, as well as an accurate summary of any actions taken and the reasons expressed therefor.

The compromise substitute also requires that before a meeting may be closed the General Counsel or Chief Legal Officer of the agency must certify that in his or her opinion the meeting may properly be closed and the reasons therefor.

Fifth. Venue.—The Senate provided that suit to enforce the act may be brought where the headquarters of the agency are located or where the plaintiff resides. In the House version, suit may be brought in the District of Columbia, where the headquarters of the agency are located, or where the meeting in question is held. The compromise substitute is the same as the House provision.

Sixth. Review by Appellate Court of compliance with act.—The Senate provided that a court that otherwise has jurisdiction to review an agency's action may, as part of that review, "inquire into violations by the agency of the requirements of this section, and afford any such relief as it deems appropriate." The House contained no comparable language. The conference substitute adopted the Senate wording.

Seventh. Personal liability of agency members for litigation costs.—The Senate authorized an individual agency member to be named as a defendant. It permitted a court to assess reasonable attorneys fees and other litigation costs against an agency member if the agency member had intentionally and repeatedly violated the Act. The House bill did not provide that an individual agency member may be held personally liable for such litigation costs. The conference substitute follows the House bill.

Eighth. Ex parte communications.—

A. DEFINITION OF EX PARTE COMMUNICATIONS

The Senate bill prohibited "ex parte communications relevant to the merits." The House bill contained a similar phrase, but in addition specified that an ex parte communication "shall not include requests for information on or status reports relative to any matter or proceeding covered by this subchapter." The conference substitute is the same as the House amendment, with a Senate amendment to strike the words "information on or."

B. APPLICABILITY OF PROHIBITION TO PERSON WHO CAUSES EX PARTE COMMUNICATIONS

The Senate prohibited an interested person from making, or knowingly causing be made, an ex parte communication. The House provision did not include the word knowingly. The conference substitute is the same as the Senate language.

C. APPLICABILITY OF AGENCY SANCTIONS TO PARTY WHO MAKES OR CAUSES EX PARTE COMMUNICATION

The Senate provides that upon receipt of an ex parte communication knowingly made or knowingly caused to be made by a party, the agency may require the party to show cause why his claim should not be adversely affected. It authorizes the agency to rule against a party who has knowingly committed a violation of the rules against ex parte communications, or knowingly caused such a violation. The House did not require that such communications be made knowingly. The conference substitute is the same as the Senate version.

Ninth. Federal Advisory Committee Act.—The House amended the Federal Advisory Committee Act so that an advisory committee meeting may be closed for the same reasons applicable under the Sunshine Act to the closing of an agency meeting. The Senate contained no comparable amendments of the Federal Advisory Committee Act. The conference substitute is the same as the House language.

Mr. President, I think it is kind of fitting that on the 200th birthday of this country we determine that our people are mature enough after 200 years so that they will be able, be qualified and capable of seeing how their business is conducted by the Federal agencies, and I urge the adoption of the report.

The PRESIDING OFFICER. The question is on agreeing to the conference report.

The conference report was agreed to.

Mr. CHILES. Mr. President, I move to reconsider the vote by which

the conference report was agreed to.

Mr. CLARK. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

EXECUTIVE ACTION

(Volume 12—Number 38, pps. 1333–1334)

Government in the Sunshine Act

(The President's Remarks Upon Signing S. 5 Into Law, September 13, 1976)

Distinguished Members of the House and the Senate, members of the administration and guests:

It is my great privilege and honor this morning to sign into law S. 5, the Government in Sunshine Act.

I strongly endorse the concept which underlies this legislation, that the decisionmaking process and the decisionmaking business of regulatory agencies must be open to the public.

And I congratulate the Members of the Congress in making certain that this legislation comes to the White House and is available for my signature on this occasion.

In a democracy, the public has a right to know not only what the government decides, but why and by what process.

Today, many citizens feel that their government is too remote; that it is not responsive to their needs. This legislation should go a long way in reaffirming that government exists for the people, not apart from the people.

Under this law some 50 regulatory agencies, including the Securities and Exchange Commission, the Civil Service Commission, and the National Science Board, are required to give advance notice of their meetings and then hold these meetings in public. If an agency votes to close a session for one of the specific reasons set forth in the law, verbatim transcripts of most such meetings would be available to the public.

The law also prohibits any communication between agency officials and outside persons having an interest in matters being considered before a regulatory body. Furthermore, the Freedom of Information Act has been amended by narrowing the authority of agencies to withhold information from the public.

The Government in Sunshine Act is in keeping with America's proud heritage that the government serves and the people rule. This afternoon, I am delighted to sign this legislation and to reaffirm that heritage and let the sunshine in.

Note: The President spoke at 12:07 p.m. in the Rose Garden at the White House.

As enacted, the Government in the Sunshine Act (S. 5) is Public Law 94–409, approved September 13, 1976.

Government in the Sunshine Act

(Statement by the President on Signing S. 5 Into Law. September 13, 1976)

I have today signed into law S. 5, known as the "Government in the Sunshine Act". I strongly endorse the concept which underlies this legislation—that most of the decisionmaking business of regulatory agencies can and should be open to the public.

Under this new law, certain agencies, such as the Securities and Exchange Commission, the Civil Service Commission, and the National Science Board—approximately 50 in all—are required to give notice in advance and hold their business meetings open to public observations, unless the agency votes to close a session for a specific reason permitted by the act. Verbatim transcripts would be required to be maintained and made available to the public for many of the closed meetings.

Communications between agency officials and outside persons having an interest in a statutorily required hearing or an adjudication are prohibited. Furthermore, the provision of the Freedom of Information Act which permits an agency to withhold certain information when authorized to do so by statute has been narrowed to authorize such withholding only if the statute specifically prohibits disclosure, or establishes particular criteria for the withholding, or refers to particular types of matters to be withheld. The new act also amends the Federal Advisory Committee Act to permit the closing of such committee meetings for the same reasons meetings may be closed under this act.

I wholeheartedly support the objective of government in the sunshine. I am concerned, however, that in a few instances unnecessarily ambiguous and perhaps harmful provisions were included in S. 5.

The most serious problem concerns the Freedom of Information Act exemption for withholding information specifically exempted from disclosure by another statute. While that exemption may well be more inclusive than necessary, the amendment in this act was the subject of many changes and was adopted without a clear or adequate record of what statutes would be affected and what changes are intended. Under such circumstances, it can be anticipated that many unintended results will occur including adverse effects on current protections of personal privacy, and further corrective legislation will likely be required.

Moreover, the ambiguous definition of the meetings covered by this act, the unnecessary rigidity of certain of the act's procedures, and the potentially burdensome requirement for the maintenance of transcripts are provisions which may require modification. Implementation of the act should be carefully monitored by the executive branch and the Congress with this in mind.

Despite these concerns, I commend the Congress both for its initiative and the general responsiveness of this legislation to the recommendations of my administration that the "Government in the Sunshine Act" genuinely benefit the American people and their government.

Note: As enacted, the Government in the Sunshine Act (S. 5) is Public Law 94–409, approved September 13, 1976.

○

UNIVERSITY OF FLORIDA
3 1262 09113 1283